Digitized by the Internet Archive
in 2025

https://archive.org/details/regulationofphys0000harr

REGULATION OF PHYSICIANS BY LAW

A DISSERTATION ON REGULATION BY LAW OF THE OCCUPATION OF HEALING DISEASES OF HUMAN BEINGS

HARRY EUGENE KELLY
OF THE
CHICAGO BAR

COPYRIGHT, 1925
BY THE
AMERICAN MEDICAL ASSOCIATION
CHICAGO

BOSTON MEDICAL
JUL 16 1926
LIBRARY

22767 Wad.

31.B.59.

PREFACE

This essay is not a special plea or a partisan brief in professional support of a client's position. Neither is it an exhaustive treatise on the law or the medicine of its subject matter. It is an argumentative statement of the situation respecting legislative regulation of the occupation of treating diseases and injuries and physical and mental abnormalities of human beings, as I see it after studying it more than twenty years. My object is to explain the legal substance of such regulation to physicians, the medical substance of it to lawyers, and both to laymen, and to acquaint all public officers with its general character and purpose.

HARRY EUGENE KELLY.

Chicago, May 20, 1924.

CONTENTS

I. Disease Impairs the State..... 1
Function of the State.
Disease and health.
Ravages of disease and importance of health to the State.

II. The Physician Is the Primary Agent for Preventing and Resisting Disease..... 5
He studies disease.
His is the greatest of the world's professions.

III. It Is Necessary and Proper to Regulate the Physician's Occupation by Law..... 7
Objects of regulation not understood.
Laymen as judges of physicians' qualifications.
The personal liberty argument.
What Spencer and Mill said about personal liberty.
There is no personal liberty to commit frauds or employ crooked doctors.
What a court says about personal liberty.
Objects of regulatory statutes.
Want of knowledge and skill.
Want of character.
Recognition by courts of need of doctors with knowledge and character.

IV. What is the Necessary Scope of the State's Regulation? 19
To make all doctors competent.
Not to prescribe healing methods by legislation.
Why the law should not prefer any school of healing.

V. Classification of Healers on the Basis of Drugs or Surgery with the Knife Is Fallacious..... 25
The argument based on harmless treatment.
Merely harmless treatment is not enough.
Drugs and knife are only part of the healing agents.
Great harm may be done without drugs and knife.
The test is diagnosis.

VI. Educational Requirements Should Be Non-sectarian, Should Disregard Cults and Should Put the Emphasis on Diagnosis..... 31
Stress knowledge of disease more and treatment less.

Old statutes ignored sects of healing.
All healers are called on to try to do the same thing.
Malpractice may consist of lack of care in diagnosis.
One reasonable scholastic standard for all who treat the sick.

VII. Why Is There Opposition to Regulation and What Is the Nature of It? 40
Because many healers have not had reasonable preparation.
Because short course cult colleges could not exist under reasonable standards.

VIII. Stock Arguments Used Against Regulation and the Facts 43
The stock arguments.
The facts. The medical profession is sincerely and unselfishly for proficiency.
The cults seek monopoly.
Educated physicians would profit financially if quacks were left unrestrained.

IX. What Are the Origin and Effect of Sects in Healing? 47
Trying to be doctors without necessary preparation.
Hoodwinking legislators.
Object of cults is to lower standards to their own deficiencies.
Bad effects of cults.

X. Existing Statutes Are Erroneously Framed on a Theory That Tends to Perpetuate Present Cults and Will Indefinitely Create New Ones 53
Standards are made higher for educated doctors and lower for ignorant ones.
The poor doctor gets the rewards belonging to the good one.
State fails to realize objects of regulatory legislation.
Special privileges are extended to the less qualified doctors.
Healing is one indivisible science.
Practice of only one remedial agent impossible.
The law must provide for general practitioners.
Multiple standards and multiple boards are evils.

XI. The Standard Uniform Regulation Should Apply to Professional Healers Promoting Religious Organizations or Religious Propaganda by Their Treatment of Diseases..... 63
Statutory exemptions of religious healers.
Religious freedom vs. illegal business, and the practice of healing under the cloak of religion.

XII. Special Official Agencies Must Be Provided for the Administration of the Regulatory Statutes.... 70
Special service required.
Broad qualifications of administrators.
Function of state licensing boards.
Moral grounds for refusal or revocation of licenses.
Unprofessional or dishonorable conduct.
Obtaining money for promising to cure incurable cases.

XIII. Individual States of the United States Have Legal Power to Regulate the Physician's Occupation.. 81
Police power.
General statement of the law.
Law of the revocation of licenses.
A board may revoke licenses.
Court review not necessary.
Revocation is not a criminal action.
Same board may grant and revoke licenses.
Procedure for revocation not required to be same as court procedure.
Revocation not necessarily based on professional relations.
As to ex post facto.
The conviction of a crime indicates want of moral qualification.
Criminal penalties.

XIV. How the Situation May Be Improved..... 96
The task is for the State legislatures.
Not necessary to tolerate present bad methods of regulation.
Selfish interests are at the bottom of low standards.
Prepare a bill for a uniform law.
More and better organization.

REGULATION OF PHYSICIANS BY LAW

A DISSERTATION ON REGULATION BY LAW OF THE OCCUPATION OF HEALING DISEASES OF HUMAN BEINGS

I. Disease Impairs the State

FUNCTION OF THE STATE

The supreme factor in our lives is the state. It was evolved by the people from their experience with primeval conditions as the instrument of co-operation among individual persons for registering their composite will and promoting their joint welfare. It has endured to the present day, and still exerts supreme authority extending to the life of every person. It acts primarily in the interest of the people as a whole, but is necessarily founded upon the existence, effectiveness and prosperity of the component individual persons, without whom there could be no people and no state. It presupposes its own perpetuity. Seeking increased efficiency, it strives to abolish every menace to the existence or welfare of the individual person. For that purpose it employs government, which is the state's instrumentality for ascertaining and enforcing the people's will.

DISEASE AND HEALTH

Disease is deviation from the healthy or normal condition of any of the functions or tissues of the individual human body, or a perturbation of its normal actions. Its antithesis is health, which is soundness of body, or normal bodily condition, or that condition of the living human body and of its various parts and functions conducive to its efficiency and prolonged life.

Disease impairs the body and mind of the individual person, ruins his efficiency and ultimately destroys him. The strength of a state is but the resultant of the combined virtues, vices, ills and deficiencies of all of its individual inhabitants. Moreover, though disease originates in the individual it spreads by contagion from one person to another, and, if unarrested, ultimately to the whole people, sometimes ending in historic national plagues.

RAVAGES OF DISEASE AND IMPORTANCE OF HEALTH TO THE STATE

Herbert Spencer, one of the world's most profound students of human life, declared that "without health and energy, the industrial, the parental, the social and all other activities become more or less impossible;" and that "vigorous health and its accompanying high spirits are a larger element of happiness than any other things whatever."

This great philosopher also said:

"Occasionally only do we meet with an example of vigorous health continued to old age; hourly do we meet with examples of acute disorders, chronic ailment, general debility, premature decrepitude. . . . Not to dwell on the natural pain, the weariness, the gloom, the waste of time and money thus entailed; only consider how greatly ill-health hinders the discharge of all duties, makes business often impossible, and always more difficult; produces an irritability fatal to the right management of children; puts the functions of citizenship out of the question; and makes amusement a bore."

Disraeli, the statesman, once said:

Public health is the foundation on which repose the happiness of the people and the power of a country. The care of the public health is the first duty of a statesman.

Quoting this utterance, William Howard Taft recently reduced it to its logical and ultimate basis by declaring:

The care of individual and family health is the first and most patriotic duty of a citizen.

The Supreme Court of Ohio, speaking in 1921, said: "Of late years the doctrine of conservation has received a new impetus in our American system of government. Originally this doctrine was applied largely to mines, forests, water power, and our natural resources. Later it was extended to hogs, cattle, buffalo, and wild animals generally, and, strange to say, lastly it was applied to human beings. Sanely and sensibly it was argued that life is worth little in the abstract, but must be made effective by the conservation of the health to which that life is entitled." (Williams vs. Scudder, 131 NE 481.)

With respect to the destructiveness of disease the world has always been confronted by a practical condition, not a theory. Great plagues have destroyed people in vast numbers and threatened whole populations. We glorify the prodigious victories of the medical profession over smallpox, yellow fever, malaria, diphtheria, typhoid fever, and other scourges of individuals and peoples, achievements in which the genius and patriotism of man were never more beneficial to the human race. These devastating plagues that once threatened the existence of nations have been checked or entirely stopped. We are prone to act as though all diseases had been conquered for all time. But students of vital statistics know that the peoples of the world still face the necessity of immediately averting other destructive diseases that are now causing an alarming waste of human life. Nor is it necessary to study statistics to become aware of this fact. It is plainly deducible from our every-day observations. The necessity for con-

tinuous warfare against destruction by disease now as ever confronts the peoples of the world.

Nothing, therefore, more vitally touches the state than the promotion of the health of its individual members, involving as it does the state's existence. Disease is an ever impending menace to the state. It comes not only within the province of the state's concern, but it is the state's first concern. It must be discoverd, prevented to the extent practicable, and abolished if possible, as the state's endeavor toward self-preservation.

II. The Physician Is the Primary Agent for Preventing and Resisting Disease

He Studies Disease

As a consequence of the prevalence and destructiveness of disease, and the warfare necessary to be continuously waged by the individual and the state against it, many persons have from time immemorial engaged in healing the sick and preventing the spread of disease as an occupation for hire. They are our modern physicians, who have devoted themselves to discovering and cataloging the kinds of diseases seen by them, observing and recording their origins and differentiating characteristics, diagnosing their presence in the individual person, and discovering and applying remedial agents for curing them. They have amassed the world's great store of scientific information about diseases and their treatment, preserved in thousands of books.

His Is the Greatest of the World's Professions

The physician's occupation has become probably the world's greatest profession; great in the number of persons devoting their lives to it; great in their intellectual attainments, high character, and the respect and admiration in which the world holds them; great in the priceless knowledge, skill and services supplied by them to relieve the suffering and sorrow of men, women and children; great in their diligence and progress in acquiring new knowledge and more skill; great in the supremacy which they have attained, and are still extending, over destructive diseases; and great in their power to insure health and happiness to all mankind.

The physician is the only agency actively devoted to studying, preventing and eradicating disease, and is the chief subject for consideration by the state in making provisions for protecting the public health.

III. It Is Necessary and Proper to Regulate the Physician's Occupation by Law

OBJECTS OF REGULATION NOT UNDERSTOOD

The occupation of healing, on account of the intimacy and importance of its contact with the people, and its effect on the public health, has long been the object of regulation by law very broadly as to the intellectual attainments and moral character of its adherents. The necessity, the justice, and the legality, of much of the regulatory legislation applied to the occupation of healing have been repeatedly considered in legislatures and litigated in courts; and though its legality has been determined in multitudinous cases in the highest courts and its precise philosophy has been embodied plainly in legislative acts and in opinions of great jurists, they are both persistently misrepresented, and on that account are widely misunderstood. Lawyers misunderstand the medicine of the subject; physicians misunderstand the law of it; and laymen quite naturally misunderstand both.

LAYMEN AS JUDGES OF PHYSICIANS' QUALIFICATIONS

The legislative regulation of the physician's occupation would probably be unnecessary if every person could accurately determine for himself the physician's ability and character, because, no person being willing to submit the care of his body to ignorant or immoral healers, they could not thrive. But the layman's unaided estimate of a physician is more likely to be wrong than right. An ignorant or fraudulent quack, without conscience, with no object but plundering the sick, by untruthful advertisements of self-praise in newspapers often in large cities secures in a few days

a more numerous clientele than a learned and upright physician has been able to attract in a lifetime. Determining whether a physician is competent to practice his profession involves appraisement of the physician's understanding of matters of science with which most persons are unfamiliar. Determination of a physician's moral character is a task in which persons of the widest experience with men are not so sure of their judgment as to refuse the assistance of those who have made an actual investigation and ascertained the facts about the particular man.

THE PERSONAL LIBERTY ARGUMENT

There are those who assert that a person's disease is exclusively his own concern, and that his employment of an ignoramus to treat it, or his refusal to treat it at all, is equally so. But, since disease, though it originates in the individual person, is transmitted by him unwittingly to other persons without their knowledge or consent, and since in many other ways it directly jeopardizes the happiness of other persons, and impairs the state itself, a person's disease manifestly is not exclusively his own concern, but is also the concern of every other person and of the state.

One of the stock arguments by those who oppose legislative regulation of many important subjects is the trite assertion that "personal liberty must be preserved." That argument is used in this connection. But one's personal liberty must be so exercised as to allow to every other person an equal domain of personal liberty, else it becomes one man's license and another's oppression. We are too well acquainted with those persons who exercise their personal liberty to the extent of infringing the rights and impairing the happiness of

their associates, and who by their arbitrary and selfish conduct create most of the real need for inhibitory regulation by law. As the spirit of democracy has grown, the people have come to a better appreciation of the need of suppressing the unlimited freedom of those arbitrary persons who have contended that their own will was not only their personal liberty but also the measure of the personal liberty of their associates; and they have enacted statutes to establish the equality of all men not only theoretically before the law, but practically in the life of every community. Advocates of the special privilege of doing what they pleased in the name of personal liberty have rebelled against these just inhibitions, ostensibly to fight for freedom, but really to impose their own arbitrary will on others as the personal liberty of the people.

Personal liberty is not an exact thing measurable mathematically, but a relative condition varying with circumstances. It is not license to do what you will, regardless of the welfare of other persons, but it is decently ordered freedom within the necessities, opinions and equal freedom of associates and neighbors. Those who talk about "medical freedom" include within their numbers not only some honest, misguided persons, but all of the quacks making their living by swindling the public and trying to keep their corrupt occupations within the protection of the law, who, therefore, labor to demonstrate that their right to operate their nefarious enterprises is based upon the genuine personal liberty of the people. Hence the great hue and cry about personal liberty, set up chiefly by those who are engaged in occupations condemned by the moral sense of mankind.

WHAT SPENCER AND MILL SAID ABOUT PERSONAL LIBERTY

John Stuart Mill, the world's celebrated spokesman for the most enlarged personal liberty, writing in 1859 in his famous essay, "Liberty," and stating therein "the meaning and limits of the two maxims which together form the entire doctrine" of his essay, said:

> The maxims are, first, that the individual is not accountable to society for his actions, *in so far as these concern the interests of no person but himself;* . . . secondly, that *for such actions as are prejudicial to the interests of others, the individual is accountable,* and may be subjected either to social or legal punishment, *if society is of opinion* that the one or the other is requisite for its protection.

Herbert Spencer, writing in his great work, "Justice," and dealing with the same subject, promulgated his "doctrine of equal freedom," that every man ought to be free to do that which he will, *provided he infringe not the equal freedom of any other man.*

No statement of justice or liberty by any philosopher, statesman or publicist of recognized worth has included claims for personal liberty beyond these by Mill and Spencer. But both of them exclude license, and emphasize the interests of others than ourselves. It is apparent that under any reasonable interpretation they fall far short of the requirements of those who for selfish purposes, on the ostensible ground of personal liberty, seek to evade legislative regulation of the occupation of ministering to the sick.

THERE IS NO PERSONAL LIBERTY TO COMMIT FRAUDS OR EMPLOY CROOKED DOCTORS

It is a fraud of a most dangerous and reprehensible character for a man to secure employment as a physi-

cian to care for the sick upon the representation that he has knowledge and experience in treating diseases which he does not possess. No man has personal liberty to commit a fraud. From the point of view of the state's proper function in the administration of justice, it is not sound argument to say that if a man wants to employ a crooked or incompetent doctor for himself and his dependent family he ought to be allowed to do so. There is no right of personal liberty to patronize a fraud. Nor is such an argument in harmony with our modern conception of the duties of the state. No such argument is used to favor the frauds that touch our pocketbooks. We have come to regard health and life as more important to be preserved than money.

Legislation of this character is in fact necessary to promote and maintain the public health; and its necessity is evidenced by its general adoption.

It may not be consistently asserted, therefore, as some persons have contended, that the ignorant or immoral doctor must out of respect for personal liberty be given the right to ply his fraud under a theory analogous to *caveat emptor,* the obligation thus being put upon his sick patient to protect himself.

In the first place, the patient's health is not exclusively his own improvidently to dispose of, but it is part the state's, and his disease is not only a menace to himself but to his neighbors; so that the kind of treatment which he takes is the business of all of us.

In the second place, such a policy may not be logically or fairly indulged by the state in respect to the priceless possession of heatlh and life, in view of the settled policy of utmost protection thrown about mere property concerns of far less importance to the people, in the regulation of lawyers, bankers, brokers, railroad com-

panies, plumbers, horseshoers, and innumerable others, not to dwell upon the further legislative regulation of barbers, manufacturers of foods, venders of milk, packers of meats, and many others of similar employments. Such illustrations may be indefinitely extended by reference to the prohibited importation of trees from Japan, and to the legislative crusade against barberry bushes, the Canada thistle, English sparrows and such like.

The good of the whole people is the avowed object of government, in the pursuit of which individual convenience and preference and particular occupations must give way; and the measure of personal liberty must always be adjusted to the necessities of the application of this universally accepted principle of political administration.

WHAT A COURT SAYS ABOUT PERSONAL LIBERTY

With reference to personal liberty as involved in legislation of the kind here under consideration, the Supreme Court of Missouri, speaking in 1911, said:

"It is contended that to so construe this statute as to forbid anyone to treat the sick, without possessing the technical knowledge required to pass an examination before the state board, where such treatment does not involve such technical knowledge, would result in denying to the people a constitutional right to determine how they shall be treated, and also in denying to citizens the constitutional right to pursue a lawful calling for a livelihood; in short, that such a construction amounts to a deprivation of both liberty and property. This contention begs two questions: (1) Have the people an unrestricted right to determine how they shall be treated? (2) Has a man an unrestricted right to pursue any lawful calling? The legislature has the power

under the constitution to pass all necessary laws to guard the morals, safety, and health of the people, even if such laws in some degree operate as a restraint upon recognized constitutional rights. An absolute right to liberty or property, or even life itself, does not exist. The state may and does deprive its citizens of either of these so-called constitutional rights. When the law-making power forbids the manufacture of liquor, an absolute destruction of property results. Yet this may be done in the exercise of the police power. Our jails and penitentiary are filled with inmates who have been deprived of their liberty for the public good. The power of the state to deprive its citizens of their lives for the public good has never been questioned. In other and various ways citizens, for the public good, may be deprived of liberty and property. True, these rights of the citizen are to be impaired only when necessary for the public good. But who is to judge whether the necessity exists? The authorities agree that this power of judgment lies with the legislature." (State vs. Smith, 233 Mo. 242; 135 SW 465.)

OBJECTS OF REGULATORY STATUTES

Observing the laws regulatory of occupations and the conditions out of which they have grown, we notice that such laws very generally provide for (1) insuring the efficiency of those who pursue them and for (2) preventing their misuse of an occupation by oppressing the people.

The most casual examination of the regulations prescribed by law for the profession of healing discloses that these have been their two objects. Only slight experience with certain classes of persons who hold themselves out to the people as healers is required to

enable one to see the desirability of such laws and the pertinency of the two objects sought in their enactment.

WANT OF KNOWLEDGE AND SKILL

Cases tried in the courts, and facts otherwise brought almost daily to our notice, show the calamitous consequences of the healer's want of knowledge, or skill, or diligence, extending from one's personal inconvenience, or temporary impairment of physical or mental powers, to woeful burdens to be endured throughout life, increasing in terror as life lengthens, or, indeed, to death itself. Calamities are caused by the physician's failure to act at all, or by acting erroneously or negligently, which would have been avoided by more information, or by a higher degree of skill, or by greater diligence. Physicians of the most thorough qualifications cannot be absolutely proof against mistakes, so powerless is a human being to be perfect in any occupation, but especially in remedial ministrations to the complex organism of man. But the ignorant, or unskilled, or slothful healer is seen in daily life to be the prolific creator of irreparable sorrows, largely avoidable by better educational preparation and by the state's more careful selection of the persons who shall be permitted to hold themselves out to the people as healers. The failure or refusal to recognize a disease, or to apply the efficacious remedy, or the misuse of a therapeutic agent, by a person holding himself out as a healer of diseases, is an invasion of the public health, and, therefore, of the welfare of the state itself, and ought as far as possible to be made obnoxious to the law.

WANT OF CHARACTER

Nor is the situation less lamentable upon the other consideration to which such regulatory legislation per-

tains, that of preventing the occupation of the healer from being used to perpetrate frauds. This occupation is the favorite resort of scoundrels bent upon maka living by undoing the innocent, because into its domain come the sick, by disease rendered unable to protect themselves from the chicane of conscienceless pretenders and reduced to the ranks of the vast army of pitiable derelicts, who, vainly, seeking health and resolutely fighting death, hopefully turn their faces to every quack promising impossible relief but secretly plundering the sick.

The history of quackery, especially in great cities, embodying every kind of healers, from those ignorant or cunning pretenders who lay claim to the possession of divine powers of healing to able men trained in the best medical schools, is a record of depravity, plunder, wrong to the people, and calamities to the public health. By these pretenders persons in good health are deceived into the belief that they are sick, persons who are really sick are purposely made more so, or are made to think themselves worse than they are, and all persons who fall into their clutches are artfully defrauded. No depravity is deeper than that of these emissaries of villainy. It is the worse because carried on against the weak and innocent, under the shielding cloak of those humane pretensions to which we all harken. This great scourge should be wiped out by the hand of the state, whatever the cost in money, or inconvenience, or trouble to honest physicians.

In all legislative acts passed for regulating the occupation of healing the sick, ample provisions should be made for rendering it impossible to use the profession for committing frauds on the people. There is no part of a legislative act relating to this subject which pro-

vides a greater service for the people than that prescribing grounds for the revocation of the licenses of unworthy doctors and for the refusal to grant licenses to unworthy applicants for them.

We ought to strike at fraud wherever we find it. The most effective means ought to be put into the hands of public officers for carrying on a vigorous and constant warfare against men who attempt to make villainy a profitable business through the agency of that profession to which all men have learned to look with the hope of receiving fair and efficient treatment for relief from disease, suffering and death. This much the medical profession ought to continue to try to accomplish, because it is a necessary public service, and because all respectable persons sincerely desire to support every movement for preventing fraud. The people have only to be informed correctly what the fraud is, and where it is, to be aroused to giving their power freely to honest endeavors to destroy it.

Members of the medical profession are trying to do their whole duty in this respect. Though it is a difficult task, and sometimes a thankless one, to ferret out scoundrels who conceal themselves under the cloak of professional decency, the effort by the profession to drag them from the protection of professional privileges must go forward continuously in order to fulfil its obligation to serve the people and in order to save the honor of the profession.

RECOGNITION BY COURTS OF NEED OF DOCTORS WITH KNOWLEDGE AND CHARACTER

For the present purpose it is not necessary to rehearse the evils of the practice of healing by incompetent or immoral persons. They are everywhere recognized by

the people, and are accepted generally by legislatures and courts as ample ground for legislative control of the occupation of healing the sick.

The United States Supreme Court has said:

Few professions require more careful preparation by one who seeks to enter it than that of medicine. . . . Every one may have occasion to consult him [the physician] but comparatively few can judge of the qualifications of learning and skill which he possesses. (*Dent* v. *West Virginia,* 129 U. S. 114.)

And the same high court has also said:

The physician is one whose relations to life and health are of the most intimate character. . . . Character is as important a qualification as knowledge. . . . (*Hawker* v. *New York,* 170 U. S. 192.)

The Supreme Court of Arkansas has said:

A man or woman who is laboring under a bodily disease is, other things being equal, more easily imposed upon than one who possesses a sound mind in a sound body. The mind of a sick man, like his body, is in an abnormal condition. He is inclined to grasp at shadows and to pursue the wind, and is easily misled into paying money for medical treatment that he does not need. (*Thompson* v *Van Lear,* 77 Ark. 506.)

The Supreme Court of Iowa, speaking of the design of the law to require healers to have certain knowledge, said:

Experience has shown that this is necessary for the protection of the people against fraud and empiricism. (*State* v. *Wilhite,* 133 Iowa 226.)

The Supreme Court of Missouri has said:

It is but common knowledge that the people who have ill health or whose families are troubled with disease are more

easily and can be more readily imposed upon by persons who represent themselves as physicians, claiming that they can give them permanent relief, than any other class; and it may be added that intelligence is no protection from impositions along that line, for when a man is sick or his family is ill, whether he be intelligent or ignorant, they readily give an attentive ear to any sort of doctor who claims that he can give them relief, and are at all times ready to purchase and swallow all sorts of nostrums because they are recommended by some one who claims to be a physician. (*State* v. *Davis*, 194 Mo. 485.)

Such expressions from the opinions of the highest courts could be indefinitely multiplied. The courts follow the legislatures in recognizing the necessity of protecting the people from ignorance and perfidy in seeking relief from disease. Such protection is deemed properly provided by legislative acts enforcing the object of (1) creating a profession of efficient physicians of good moral character, and (2) preventing incompetent or immoral persons from holding themselves out to the people as engaged in that profession.

IV. What Is the Necessary Scope of the State's Regulation?

TO MAKE ALL DOCTORS COMPETENT

The state should go no further in restricting the occupation of the physician than necessary, for freedom of action is the goal of the law. What is the least that the state may do in this respect? It is apparent that logically it may do nothing less than make it impossible for any person to hold himself out professionally to the public as a healer of any kind until he has demonstrated before some legally constituted authority ample knowledge of the structure and functions of the human body, of its various organs in health and disease, and of all of the valuable remedial agencies known to the world, and prohibit any person from holding himself out as a healer of diseases who has not so demonstrated his ability to discover, within the reasonable limits of the advancement of science, the nature of the diseases with which human beings are commonly afflicted, to care for his patients in a scientific manner, and to recognize and prevent the spread of contagious diseases. Manifestly the state has done nothing until it has thus supplied a doctor with such scientific knowledge and skill.

The state should not seek, and, so far as I know, never has sought in any way, to limit a person in his choice of a physician from practitioners legally determined by it to be familiar with diseases, competent to make scientific diagnosis on which to base treatment, and informed generally on the various curative agents. The state should see that the public shall not be imposed upon by persons who lay claim to knowledge of diseases and the laws of health which they do not possess. It should prevent the perpetration of the kind of danger-

ous fraud which costs the public not only its money but inflicts on men, women and children sorrow, pain and death, and which spreads disease among the people.

NOT TO PRESCRIBE HEALING METHODS BY LEGISLATION

The Supreme Court of Iowa, in a case decided in 1906, made use of this illuminating language respecting the scope of legislative regulation:

> The design of the law is not to render unlawful any mode of treatment whatsoever, but that every one, before he shall undertake to prevent, cure or alleviate disease and pain, as an occupation, shall have some knowledge of the nature of disease, its origin, its anatomical and physiological features, its causative relations, and of the preparation and action of drugs. Experience has shown that this is necessary for the protection of the people against fraud and empiricism. No one is thereby deprived of the opportunity to exploit his "system." All exacted is that, before undertaking to do so by applying it to the functions of life, he shall be possessed of that degree of knowledge and skill required by the statute of all, and evidenced by a certificate from the proper officers of the state. (*State* v. *Wilhite,* 133 Iowa 226.)

These words briefly express the whole scope of the state in the educational supervision of the occupation of healing the sick.

The Supreme Court of Ohio, speaking more analytically, said in one of the most celebrated cases:

> But it is said that the offering of prayer to God for the recovery of the sick is not against public health or public morals or public safety or public welfare. Admitted. But is that a correct statement of the case? If the defendant prayed for the recovery of Hehl, that was the treatment he gave him for the cure of his rheumatism and for which Hehl paid him. He was practicing healing or curing disease. To assume that

legislation may be directed only against the administration of drugs or the use of the knife is to take a too narrow view. The subject of the legislation is not medicine and surgery. It is the public health or the practicing of healing. . . .

So that, regarding disease rather than the treatment of it as the subject of the legislation, it is not necessary that the statute be preventive of particular practices, but it may make the right to undertake the treatment of disease dependent upon the possession of reasonable qualifications. . . .

If we are correct in the conclusion that disease, and not the method of its treatment, is the subject of the legislation, then it is putting the cart before the horse to say that every school of healing must be recognized. That the legislature, in its wisdom, might prescribe a uniform examination, we do not doubt, and that it may recognize one school without recognizing all, is also true, if the recognition be in the exercise of proper classification and for the public welfare, and not with a view to create a monopoly in the schools recognized or a discrimination against other schools. (*State* v. *Marble,* 72 Ohio St., 21.)

The Supreme Court of California, speaking of the act regulating the practice of dentistry in that state, said:

The law does not operate to exclude any one from the profession. The field is left open to all who are in possession of the required qualifications. It simply fixes the standard under which all persons who desire to enter the profession are brought as nearly as possible to the same degree of professional competency. The law, no doubt, is discriminatory, but not in any constitutional sense. It does not discriminate between classes. The discrimination goes to the degree of learning and skill which all applicants for examination must possess. It discriminates between those who have the necessary degree of learning and skill, and those who have not; between those who are able and those who are unable to acquire it. It is not an unreasonable or capricious discrim-

ination applying to classes as such, or members of a class, but is based solely upon professional qualifications. It is a discrimination which, in the interest of the public welfare, it is the duty of the legislature to make, and the necessity for which and its nature and extent. . . . depend primarily upon the judgment of the legislature, which, when reasonably exercised, the courts cannot control. (*Ex. Parte Whitley,* 144 Cal. 167.)

Such legislation, therefore, is not enacted merely for the purpose of giving advantage or profit or any form of benefit to healers, or with their good or protection in view. The public health is the primary consideration. The benefits to healers are incidental; and are realized only in their opportunity for increased success in ministering to the sick.

WHY THE LAW SHOULD NOT PREFER ANY SCHOOL OF HEALING

It may be said generally that the state should not prefer any school or method of healing over another. The reasons for this are numerous. Doctors differ as to the particular remedy or kind of treatment that will be effective in particular cases. The treatment that is effective or available in one case may not be so in another. Not only do the so-called schools differ as to the treatment of diseases, but practitioners and adherents of any particular school differ among themselves. Osteopaths began with manipulation only, and declared war against surgery and all drugs; but they have fallen assunder now and are losing their identity in the quest by most of them for the right to administer drugs and perform surgery. Homeopaths have been divided into warring camps on the question of treatment, the high-potency or infinitesimal-dose group, and the low-

potency group; but they have all but lost their identity in the general movement toward non-sectarian healing. Regulars also differ widely among themselves as to treatment; but they logically and correctly insist upon uniform fundamental training for all persons who would treat the sick. Nor have chiropractors been able to prevent a breach in their organization, some of them denying and others asserting the necessity for diagnosis, but they still join generally in their original proposition that ignorance of nearly everything medical is not a disqualification for attempting to heal all kinds of diseases. Knowledge and teaching as to the treatment of diseases vary from year to year as experience and investigation proceed. Finally, experience has shown that it is wise to grant to the scientific man, who has demonstrated his familiarity with all diseases, the right to treat them as his judgment may indicate.

It is apparent from these recognized facts that healing agencies, or therapeutics, or methods of treating diseases, should not as a rule be prescribed by law. The state is concerned with the occupation of the professional healer of disease from the point of view of affording to all persons bona-fide, scientific treatment, apart from warring sects, or systems or schools of practice. The problem necessarily has been to enact effective legislation for the regulation of the *occupation* of healing the sick, and ultimately for the creation of a body of physicians competent to pursue that occupation. In fact the state's object always has been in these matters to avoid "establishing criteria in regions where opinions are far apart." (Mr. Justice Holmes in U. S. v Johnson, 221 U. S. 488).

It is impractical for the state to prescribe a preference for any particular school or method of healing;

and the legislature should not prefer one above another in making the laws, nor deny equal liberties to the adherents and practitioners of all schools, nor enter the field of contention among the various sects of the art of healing, nor ordinarily undertake to dictate or specify the kind of remedy or treatment to be given to any person for his peculiar ailment. These matters should be left to the direction of the patient and the discretion and wisdom of the individual doctor, subject, of course, to suitable regulations for the control of epidemics and the management of other emergencies. The state commonly and justly provides specific remedial measures to prevent the spread of epidemics. Vaccination for smallpox is often enforced by law. The prescription by law of a prophylactic for ophthalmia neonatorum is another example of specific medication by the state, the particular drug to be used for the purpose being in some places written in the law, apparently without objection. But the state has gone to this length only in great emergencies, and has otherwise uniformly left the educated physician and his patient unrestricted in prescribing and applying treatment.

V. Classification of Healers on the Basis of Drugs or Surgery With the Knife is Fallacious

THE ARGUMENT BASED ON HARMLESS TREATMENT

Certain advocates of low legal educational requirements for healers try to make an argument upon their contention that they are using a method of healing which is not dangerous to patients or to the public, and which, therefore, is not reasonably subject to regulation by law. They profess, however, to see why strict regulation should be maintained by the state over physicians using drugs and surgeons "using the knife." They place the whole emphasis upon drugs and "the knife" as the basis of regulation. There is no foundation in fact for such a classification of doctors; and no healer can be considered safe for his patient or the public upon the basis of the method of his treatment, whatever that method may be, not even if it be by cold water.

MERELY HARMLESS TREATMENT IS NOT ENOUGH

Speaking upon this subject in 1921, the Supreme Court of Ohio said:

> Hot and cold applications are ordinarily most efficacious for temporary relief, and very seldom harmful, but merely because they are generally harmless is scarcely a reason why they should be resorted to in all cases to furnish relief. The failure to give the natural and necessary relief called for by the condition of the patient, in the shape of some positive or affirmative action by way of treatment, may be as harmful as the giving of a treatment that is harmful per se. What the patient often needs immediately is helpful treatment, and not merely harmless treatment. (*Williams* v. *Scudder,* 131 NE 481.)

DRUGS AND KNIFE ARE ONLY PART OF THE HEALING AGENTS

The administration of drugs is a small and often unimportant part of the practice of healing the sick. There are other important healing agencies. Many diseases are treated without drugs, and have always been so treated, even by those practitioners who belong to the so-called drug school, many of whom have habitually given very little medicine. Massage, manipulation, electricity, radium, the application of heat and cold, baths, diet, exercise, rest, water, suggestion, drugs, surgical operations, climate, altitude, all have their places in the treatment of diseases. Most of them have been used by doctors from the earleist history of man.

GREAT HARM MAY BE DONE WITHOUT DRUGS AND KNIFE

Ignorance in determining when to apply and how to apply these or any other methods of treatment, or in the failure to recognize grave conditions, constitutes the real danger. Consider the practice of obstetrics as an example. Drugs in this branch of practice may or may not be required in a particular case. But the highest degree of knowledge and skill may often be imperative in the management of even normal cases, regardless of any question as to the use of drugs or the surgeon's knife. There are frequent complications in which the lives of both the mother and the child may depend upon early recognition of important conditions, without respect to drugs or the knife, and in which only the best trained physicians are competent even to respond to a call to examine the patient. Many patients treated by

ignorant and unclean midwives recover; but many hundreds die from neglect and ignorant interference, or are made invalids for life. Such illustrations may be multiplied indefinitely. The failure to recognize a contagious disease may subject the public at large to disastrous consequences.

The setting of bones, and many of the most important of surgical operations, are often accomplished without the use of drugs or knife, but require the highest degree of skill, and may not be attempted by an ignorant practitioner without disaster to the individual and injury to the public health.

In the use of electricity, the x-ray, radium, and other therapeutic agents, unaccompanied by the use of drugs or the knife, great injury may be inflicted upon the human body, even death itself.

It is apparent, therefore, how a healer who uses neither drugs nor the surgeon's knife may do great harm to his patient or the public. In his ignorance, if he is untrained in the appropriate and fundamental science, he is likely to overlook grave conditions at a time when everything depends upon their immediate recognition, such, for example, as acute appendicitis, acute Bright's disease, gonorrhoeal infection of the eye, abnormal pregnancy, or hip joint disease. In all of these and in many other diseases and conditions failure to recognize the existence of the condition and neglect of proper treatment, or application of the wrong treatment, soon allows the patient to slip beyond the hope of recovery. In the beginning of hip joint disease a diagnosis of rheumatism would suggest treatment that would almost certainly make the patient a cripple, or cost him his life.

It has been argued that honest, though ignorant, practitioners would not attempt to treat such diseases, or that patients would not employ such healers in cases of that kind. Such an argument is manifestly absurd. A doctor is called, not knowing what condition is to be presented to him, by a patient equally ignorant. If neither the doctor nor the patient can make a correct diagnosis (which is always difficult in such cases at the outset) the patient may pass beyond the stage where relief is possible while the healer of limited qualifications is trying to find out whether the disease is one within the range of his manner of treatment.

It is a well known fact that massage, kneading, or manipulation, often works great injury to the human body. Such treatment of white swelling, and kindred diseases, in the care of which complete rest and quiet are absolutely necessary, would result disastrously. In diphtheria and many other diseases such treatment would be equally disastrous.

THE TEST IS DIAGNOSIS

With these considerations before us we see the reason why examinations as to qualifications should be required of persons who desire to treat even a limited number of diseases, and pretend to practice a system that does not require a prolonged course of training in the scientific branches, and why they should be required to pass examinations in all scientific subjects relating to the human body in health and disease. No man is competent to assume the responsibilities of a healer of any kind until he is well grounded in all the fundamental scientific knowledge about the human body. Until he is so trained his practice is a constant menace to the public health. If he agrees to treat but a limited class

of diseases, or to confine his activities to but one part of the body, he is still a dangerous man until he is able to distinguish the disease which he purposes to treat from all the other diseases which he does not purpose to treat. Patients do not come labeled with their complaints, and the practitioner is manifestly unable to make a correct diagnosis until he has familiarized himself with the human body, the laws of its health, and the signs and symptoms of the diseases to which it is heir.

No one contends that the specialist who limits his practice to diseases of the eye, or the ear, is competent to practice on these organs until he has studied the fundamental branches of all the sciences relating to the human body. The same is true of the skin specialist, the genito-urinary specialist, the specialist in surgery, and all the other specialists. Not one of these is a safe doctor, from the point of view of the public health, until he is familiar with all of the scientific knowledge about the human body.

If the eye specialist does not know anything about the diseases of the kidney, or of the chemistry of the urine, it follows that he will fail to understand the significance of certain eye symptoms of the utmost importance due to kidney diseases. If he is ignorant of gonorrhoea, it follows that he is incompetent to diagnose and to treat certain grave eye diseases, neglect of which results in blindness. If he does not know the symptoms of syphilis, malaria, gout, or rheumatism, it follows that he is incompetent to diagnose and to treat many important eye diseases.

The same is true of all specialists and all practitioners. No person can safely practice healing, even in the most limited field, until he is familiar with the signs and symptoms of all diseases. He cannot acquire this

familiarity without study of all of the branches of scientific knowledge relating to the human body in health and disease.

It may not be said, therefore, that a healer is a safe practitioner because he does not use drugs or the surgeon's knife, or that classification of healers on the basis of the use or non-use of drugs or the surgeon's knife affords ample protection to the public health.

For this reason the Supreme Court of Ohio said:

"To assume that legislation may be directed only against the administration of drugs or the use of the knife is to take a too narrow view. The subject of the legislation is not medicine or surgery. It is the public health or the practice of healing." (State v. Marble, 72 Ohio St. 21.)

VI. Educational Requirements Should Be Non-Sectarian, Should Disregard Cults and Should Put the Emphasis on Diagnosis

stress knowledge of disease more and treatment less

From these observations it is apparent that the test of the healer's efficiency is not determined primarily by his plan of treating diseases, but by his knowledge of diseases, and by his ability to make a correct diagnosis of the conditions which he is called to examine. His ability to treat diseases, therefore, depends upon his familiarity with all of the branches of scientific knowledge pertaining to them.

The same examinations should be required of all persons who purpose to practice healing, particularly because all practitioners, in respect at least to the all-important function of diagnosis, necessarily assume the *same* responsibilities. It is imperative that everybody who holds himself out as a healer of diseases should be able to recognize the exact nature of the conditions which he is called upon to examine, so that he may be able to apply a proper remedial agent, or send the patient to a physician who can. Without the scientific knowledge which enables him to recognize the nature of diseases, the healer may not safely prescribe any form of treatment, and he becomes a grave menace to public health even by doing nothing at all.

It must be apparent to the person who examines this subject only casually that the use or nonuse of drugs or of the surgeon's knife does not establish a line of

demarcation by which the practitioners who are dangerous to the public health may be marked off from the practitioners who are not.

OLD STATUTES IGNORED SECTS OF HEALING

All of the older statutes were framed upon this conclusion, and in them the practice of medicine was so defined as to exclude reference to drugs and medicines and surgery entirely, and to include within their regulation upon the same basis of scholarship all kinds of healing pursued as an occupation, without regard to schools or systems of any particular name or any particular therapeutic agent. All men who demonstrated their moral and intellectual fitness to practice healing, and who demonstrated their familiarity with the diseases which they might reasonably expect to be called upon to treat, had the right to heal and to use their judgment and experience in applying their treatment and in selecting the proper therapeutic agent for the particular ailment. Such statutes assumed that every physician would have scholarly acquaintance with all known remedial agents. When the applicant secured his license under such a statute he could practice the tenets of any school of healing and use any and all therapeutic agents; for the law ignored all sects of healing as such, and the licensed physician was obligated to see that his patient secured the benefit of the particular treatment that would cure the given malady, regardless of schools or sects of healing.

That this was and still is the proper kind of statute for the regulation of the occupation of healing diseases, in conformity with constitutional law and sound public policy, is amply supported by high judicial authority.

ALL HEALERS ARE CALLED UPON TO TRY TO DO THE SAME THING

The Supreme Court of Alabama in 1902 rendered a noteworthy opinion, which has become famous as a learned legal analysis of the situation with which we are here dealing. In that opinion the court was considering the practice of osteopathy. The following extract from it is pertinent here:

In fact, the practitioners of that school of the healing art repudiate as remedial agents all drugs, medicinal substances, and the knife, and other surgical instruments and appliances, in the treatment or alleviation of diseases. . . . They, in consequence, know nothing of the medicinal properties of drugs and other medicinal substances, or of the compounding and administering of drugs in the cure of diseases. Their method of treatment is entirely external, consisting of "a system of a manipulation of the limbs and body of the patient with the hands, by kneading, rubbing, or pressing upon the parts of the body." However, in order to practice the profession of osteopathy skillfully and scientifically, it is admitted that the practitioner must know anatomy, physiology, hygiene, histology, and pathology. Confessedly, the requirement of a knowledge on the part of the practitioners of all of these branches of the science of healing the sick or diseased is to enable him to skilfully determine the disease with which his patient is afflicted, and to aid him in making a proper application of his system of manipulation. For it is entirely clear from the evidence that the practitioner does not make the same application of his remedy to all diseases, but that he applies such system of manipulation as is most remedial in alleviating or curing the particular disease he is called upon to treat. *In other words, after a diagnosis of the disease of the patient he applies the remedy most suitable to its cure;* confining it, however, to his system of manipulation as a remedial agent. So, too, a practitioner of medicine is required

to know anatomy, physiology, hygiene, histology, and pathology, in order to enable him to skillfully and scientifically determine from what disease his patient is suffering; and, after so determining, he must also know how and what remedial agents should be prescribed for the alleviation or cure of the disease. So, after all, the only difference between the two is in the matter of therapeutics,—that branch of medicinal science which considers the application of remedies as a means of cure. The former, as we have shown, applies his external remedies exclusively, while the latter prescribes internal or external, or both, as the exigencies of the case may require. *The result sought to be accomplished by each is the same,—to relieve the patient's illness; to cure him. Both are practicing the art of healing or curing human diseases.* (*Bragg* v. *Alabama,* 134 Alab. 165.)

In 1912 the United States Supreme Court decided an important case involving the validity of the Texas medical practice act. Collins had been arrested for treating a patient for hay fever by osteopathy. He was a graduate of the American School of Osteopathy at Kirksville, Missouri, where he had taken a two years' course of study. It was not shown in the case that he had presented his diploma to the Texas authorities, or that he had attempted to secure a license from them under the act. Collins contended that the denial to him of the right to practice osteopathy without such a license was contrary to the constitution of the United States. The following extracts from the opinion of the court, which unanimously affirmed the conviction of Collins, are important in this discussion:

It is true that he does not administer drugs, but he practises what at least purports to be the healing art. The state constitutionally may prescribe conditions to such practice, considered by it to be necessary or useful to secure competence in those who follow it. . . . An osteopath professes—the

plaintiff in error professes, as we understand it—to help certain ailments by scientific manipulation affecting the nerve centers. It is intelligible, therefore, that the state should require of him a scientific training. *He, like others, must begin by a diagnosis.* It is no answer to say that in many instances the diagnosis is easy—that a man knows it when he has a cold or a toothache. *For a general practice science is needed. An osteopath undertakes to be something more than a nurse or a masseur, and the difference rest precisely in a claim to greater science, which the state requires him to prove.* (*Collins* v. *Texas,* 223 U. S. 288.)

In 1917 the Supreme Court of the United States said:

To treat a disease there must be an appreciation of it, a distinction between it and other diseases, and special knowledge is therefore required. (*Crane* v. *Johnson,* 242 U. S. 339.)

MALPRACTICE MAY CONSIST OF LACK OF CARE IN DIAGNOSIS

The case of Kuechler vs. Volgmann, decided by the Supreme Court of Wisconsin in April, 1923, sheds new light on the matter of diagnosis in the occupation of healing diseases. Volgmann was a chiropractor, who held himself out as capable of treating diseases without the use of medicines or drugs. He treated Kuechler upon the misapprehension that his patient was suffering from a derangement of the stomach, whereas he was in fact suffering from a tumor in the head. Volgmann continued his misapplied treatment for eight months. During all of that time the patient grew worse. Later Kuechler's ailment was properly diagnosed, and he submitted himself to an operation to relieve the intercranial pressure resulting from the growth of the tumor.

Kuechler brought a suit against Volgmann for damages on the ground that if Volgmann had possessed

ordinary skill or ability in treating diseases he would by the exercise of ordinary care have known that his patient was suffering from the tumor, and would have known that the methods adopted by him to relieve his patient were not only useless but that they aggravated his suffering and affliction, and that an operation at the time when the patient first consulted him would have effected an immediate and permanent cure. Kuechler complained that the tumor had been allowed to grow under Volgmann's treatment until it had become impossible for surgeons to remove it, and that when the proper diagnosis was finally made the only relief possible to the patient was the less than complete remedial operation performed.

The court first decided that since a physician is required to exercise only that degree of care, diligence, judgment and skill which other physicians of good standing of the same school or symtem of practice should exercise in the same or similar localities under like or similar circumstances, having due regard to the advanced state of the medical profession at the time in question. Volgmann, having treated Kuechler according to the methods used by chiropractors, was held not chargeable with negligence or lack of skill in *treatment*. The court then said:

> Such is undoubtedly the rule of law in this state, and were the complaint grounded upon a lack of skill, care, or of negligence, in treatment only, the trial court came to the right conclusion. *But we construe the gravamen of the complaint to charge a lack of skill and care in diagnosis, in the failure of defendant to discover the nature of the ailment from which plaintiff suffered.* Malpractice may consist in a lack of skill or care in diagnosis as well as in treatment. A woman may be in the early stages of pregnancy. A doctor may diagnose

it as an ovarian tumor and operate. There may be no lack of skill or care in the operation, but there may be in the diagnosis. . . . That chiropractors, who . . . are permitted to practice without a license in this state, are required to exercise care and skill in diagnosis, if they undertake to diagnose, there can be no doubt. . . . It is clear from the allegations of the complaint that defendant undertook to diagnose as well as to treat the disease. Diagnosis is ordinarily assumed and performed by licensed medical or osteopathic physicians. But it may be assumed by others, and it is held that the practice of chiropractic is the practice of medicine. And the fact that chiropractors abstain from the use of words like "diagnosis," "treatment," or "disease" is immaterial. What they hold themselves out to do and what they do is to treat disease, and the substitution of words like "analysis," "palpation," and "adjustment" does not change the nature of their act. Hence, when the defendant assumed to perform that duty he must exercise the care and skill in so doing that is usually exercised by a recognized school of the medical profession. (*Kuechler* v. *Volgmann,* 192 N W. 1015.)

This case places profound and altogether correct emphasis upon diagnosis as the chief element in holding one's self out as a doctor. It illustrates and proves the point which I am making in this discourse and does so by sound reasoning, which will undoubtedly stand the test of time.

I digress, however, to note an implication made in that case, that different degrees of care, diligence, judgment and skill are required by different "schools or systems of practice." As we have seen, such a rule is contrary to the logic and facts of the situation. Moreover, such a rule apparently implies the assumption that physicians commonly give treatment without diagnosis. This is not the procedure—and it is not practicable to make it the procedure—of most physicians in general practice,

nor indeed, of most physicians pursuing specialties, because physicians as a practical matter are uniformly required to make diagnosis as well as apply treatment. While there is an increasing tendency to make diagnosis a specialty, and to make specialties out of certain kinds of treatment, this tendency, on account of the necessities of the patient in emergencies and in innumerable cases where only one physician is available, cannot be made the basis of the formulation of minimum educational requirements.

ONE REASONABLE SCHOLASTIC STANDARD FOR ALL WHO TREAT THE SICK

My thesis, therefore, is proved upon facts, upon therapeutic and philosophic principles, and upon judicial authorities. All persons who treat the sick as an occupation should be required to measure up to the same reasonable scholastic plane, be subjected to one and the same just standard of knowledge and skill, and be required to pass the same tests in the same fundamental subjects, before being permitted to try to heal the sick according to any method of treatment whatever, because all of them initially are expected to do the same thing. No other system is at once so logical, just and humane. The state has no interest in cults, but has a vital interest in educated, skilful, honest physicians able to diagnose and distinguish between the various ailments and to direct the application of all remedial agents thereto. When acts regulatory of this occupation shall be written, apart from the influence of healing cults on legislators, exclusively on the basis of the public health, they will embody this principle. Then they will not only be right, but permanent. Until then they will con-

tinue to be neither right nor permanent. Oceans of legislative acts and continents of judicial decisions cannot change a principle that exists in the nature of things.

VII. Why Is There Opposition to Regulation and What Is the Nature of It?

Because many healers have not had reasonable preparation

Long observation has convinced me that the principal obstacle to adoption of wholesome laws requiring all practitioners of healing the sick to be equally qualified before engaging in their occupation is the fact that throughout the country thousands of persons are following this profession without suitable preparation for it, some of them in conformity with existing statutes, but most of them in contravention of them. Not having made any reasonable effort to qualify themselves, they know that they could not continue to receive emoluments from their practice, and make their living out of it, if they were compelled to show possession of even elementary qualifications. Hence they oppose a uniform legal standard of reasonable educational requirements for all doctors.

Such persons could receive no credence from the people, or from legislators, if they should disclose the ignoble reason for their opposition to wholesome laws, because both the people and their legislators naturally favor the restriction of the practice of healing to persons properly qualified to perform that service. Therefore, these unprepared healers conspire to conceal the real questions from the people, to set up false issues, and to lead legislators away from fundamental principles to invented scandal, fraudulent misrepresentation and false theories of both law and medicine.

Following this legislative program of making the worse appear the better reason, concealing the fact that

their opposition to wholesome legislation is in reality based upon their own deficiencies, they strive to appear to be honestly placing their opposition upon worthy grounds. They pretend to be devoted to the public welfare, to justice and to progressive development of science.

These pretentions are made to conceal the real object, which is to maintain inferior legal standards of educational requirements as a special privilege to persons not willing or able to comply with reasonable standards, or to proprietors of inferior schools bidding for unprepared students, unequipped to teach the subjects of a proper course in healing the sick or to compete with good schools in giving the same courses of study.

The untutored healers succeeding financially in passing themselves off to the people are numerous. All of them are opponents of reasonable educational standards. Their own numbers are augmented by numerous persons who for one reason or another champion their alleged cause, deluded patients, dealers in proprietary medicines and their beneficiaries, opponents of vaccination, of vivesection and of inoculation, fakers, quacks, founders of new kinds of propaganda and organizers of new cults. They fight together to retain their profitable ventures, feeling that they have a common cause.

BECAUSE SHORT COURSE CULT COLLEGES COULD NOT EXIST UNDER REASONABLE STANDARDS

The most active opponents are the proprietors of the low grade cult schools which assume to make doctors out of ignorant persons in a few months. These schools are bonanzas. They gather in armies of students who pay high tuition fees. They turn out armies of graduates for whom places to ply their frauds

profitably must be provided in order to keep new students coming. A reasonable standard of educational requirements would kill these geese that lay golden eggs. Their only attraction is the speed with which they convert ignoramuses into doctors without bothering them about studying diseases or the methods of curing them. These schools can stay alive only under laws that make it possible for their graduates to hold themselves out to heal the sick without having even elementary scientific knowledge of the human body. The proprietors of such schools, therefore, are the most strenuous opponents of a reasonable single legal standard of educational qualifications for all persons holding themselves out as engaged in healing diseases.

Joined together firmly in an organization for promoting their selfish purposes, exaggerating their voting strength and proclaiming their disposition to use it, misrepresenting their educational qualifications and their ability to heal the sick, and deriding educated physicians by venomous and prejudicial scandal, all of these opponents, unmolested by organized opposition from any source, persistently and continuously use every known influence to defeat proposed legislation for erecting reasonable standards of professional training. As long as they are unopposed they will succeed; when opposed their selfishness and weakness will be made known, and they will fail.

VIII. Stock Arguments Used Against Regulation and the Facts

THE STOCK ARGUMENTS

The specious reasons given by opponents of reasonable standards are suggestive of the kind of campaign everywhere conducted by them.

First is the allegation that proponents of the same legal requirements of elementary knowledge for all healers are medical men engaged in a conspiracy to create in themselves a monopoly of the occupation of healing the sick.

There is also the proposition that proponents of reasonable standards are medical men attempting to establish by law one kind of remedial agent, or curative "system," of healing diseases, and to prevent the use of every other.

There is, moreover, the charge that the promoters of fair and reasonable qualifications are medical men engaged in an attempt to avoid the competition of the sub-standard practitioners, who pretend to believe that their own services have become so much more acceptable to the sick than the services of medical men that medical men have joined to get rid of them as invincible competitors.

No pretending healer is too ignorant not to brag about his great prowess in curing diseases. He often manifestly possesses no qualifications, not even ordinary common school education, to say nothing of familiarity with the laws of health and disease, and yet lays claim to supreme knowledge and skill in healing the sick as a natural or divine gift.

THE FACTS. THE MEDICAL PROFESSION IS SINCERELY AND UNSELFISHLY FOR PROFICIENCY

The acquaintance which most of us have with members of the medical profession supplies to every impartial man's mind a conclusive answer to such arguments. Medical men are manifestly not engaged in the nefarious enterprises thus charged. We associate daily with them. We see them in their labors at the bedside in the home and in the hospital. We hear them speak freely their sentiments on medical subjects, often in open and public disagreement, in the communities in which they reside. We read their professional journals, and see in them the frank debates among medical men. We see them freely giving their time, their labor, their skill, their learning—more freely than any other men do—to charity of every kind, and their inventions and discoveries without remuneration and free from letters patent to the unrestricted use of all the world, their very lives to the people in private or public catasrophe. We see them laboring incessantly, by every method known to man, by the expenditure of their own money and effort, to decrease by quarantine and destroy by every other means all the diseases that infest the body and mind of man, and thus unselfishly to diminish their employment and financial income, ever seeking the good of the human race. Thus we actually *know* that the medical profession is sincerely dedicated to the highest proficiency in healing the sick and protecting the public health.

The proponents of bills to fix reasonable educational standards in healing the sick have urged the adoption of only elementary educational standards, applicable to all persons alike, attainable by all persons of industry and intelligence, with ample devices for securing a fair

examination to every applicant for the right to practice healing, a situation not consonant with attempts toward monopoly or opposition to competitors, but really rendering monopoly impossible and creating unlimited competitors. No proposed bill, to say nothing of any law, has contained provisions for the creation of a monopoly of the occupation of healing, or for the elimination of competition therein.

THE CULTS SEEK MONOPOLY

Many of those persons who have opposed reasonable educational requirements and used their influence to secure low educational standards have tried to secure the enactment of laws that would enable their cults to control the administration of a particular therapeutic agent by preventing its use by persons not members of their organization and that would prohibit persons from holding themselves out as doctors of their particular school except by their special consent, and generally to gain and to hold a monopoly of their claimed curative methods for their own enrichment. These very persons, supported adroitly by venders of monopolized proprietary medicines, have led in the hue and cry against the medical profession as a "medical trust."

EDUCATED PHYSICIANS WOULD PROFIT FINANCIALLY IF QUACKS WERE LEFT UNRESTRAINED

It will not escape the notice of the most casual observer that the best qualified physician, instead of being injured by competition from the ill prepared doctor, is more likely to be enriched by repairing the injuries that result from mistakes and wrongs following in the train of incompetents and quacks. Nor will it

escape notice that there could be no effort by any intelligent person to establish by law a particular school of healing. Such a thing would not only be undesirable but impossible; and its undesirability and impossibility are more keenly appreciated by medical men than by laymen.

It is contended by some of the adversaries of increased educational standards for healers, and even by some educated physicians who have become disgusted with the condition of the law, that, though the state has the power to enforce such standards, the *expedient* course would be to abandon all regulation of healers and allow them to pursue their own sweet will, responsible only to their patients, and to them *only in damages*. This course would put money in the pocket of the skilled physician, who would be called upon to repair the injuries wrought by quacks, but it would unconscionably ignore the public health. It would be signally opposed to present-day tendencies of government, which is now deemed to be properly concerned with providing the people with the most efficacious means of enjoying life, preventing all catastrophes, both public and private, and avoiding every evil to mankind. An action for damages is not regarded as much solace to men permanently injured by improper treatment, not to consider those who are killed in that manner.

IX. What Are the Origin and Effect of Sects in Healing?

TRYING TO BE DOCTORS WITHOUT NECESSARY PREPARATION

A fundamental condition for thought in the establishment of legal educational requirements in the regulation of the occupation of healing the sick is the existence of the many cults among practitioners of healing.

No matter what the requirements of the law are, or how easily attainable any standard of proficiency required for admission to the enjoyment of its benefits, there are persons seeking its privileges who are not willing or able to qualify to receive them; but such persons desire, nevertheless, to have all of the privileges and benefits of the law to which they do not conform. However meager may be the qualifications required for admission to the enjoyment of the privilege of practicing the occupation of healing the sick, there are always those seeking the right to follow that occupation who are not willing or able to meet the legal requirements, but who, notwithstanding their want of qualification, seek the enjoyment of the benefits conferred by the law on legally authorized practitioners and contrive by one kind of means or another to hold themselves out to the public as "doctors."

A self-appointed healer who seeks the benefits of the law, but will not or can not meet the educational requirements, devotes himself to contriving means by which to get into the profession, and, of course, to make use of the title "Doctor,"—which, after all, is the most coveted possession of the healer, without which the occupation of treating diseases is undignified and unremunerative. Not possessing the necessary educational

attainments to enable him legally to get into the physician's profession, and desiring to enjoy all of its privileges without subjecting himself to any of the hardships incident to their lawful exercise, he organizes into a society all persons smarting under his peculiar legal disabilities, together with some of their friends and partisans, sets up the ensign of unselfish devotion to the people, and makes it appear that his organization is founded to promote a lasting benefit to humanity. He seizes on such an object because the people listen sensitively to the claims of organizations devoted to the furtherance of justice. But in reality he promotes his society with the purpose of lowering the legal standards of proficiency to a level with his own particular intellectual deficiencies. His society then begins the task of converting the legislature to his view of the propriety and necessity of passing a new *general* law for his *special* benefit. His activities are generally intensified by his proprietorship of a financially profitable school, in which the tenets of his curative "system" are taught, and which is abundantly advertised in the legislative process.

HOODWINKING LEGISLATORS

The officers of such an organization cunningly address the legislature on the assumption that legislators want to do justice, and that they are ever watchful to eradicate unfair conditions of every sort. They very adroitly proceed on that assumption, for it is true. Nearly every member of a legislature tries to promote justice, and has constantly in mind that worthy ambition. Every member's secret purpose is to conduct his legislative business in such a manner as to avoid criticism on the ground that his official conduct has been oppressive or otherwise unjust. Those who seek lower

standards thus designedly approach legislators in their most indulgent moods, and seek the benefits of being thought by them to be friends of public freedom and justice, submerging under their feigned public usefulness their own selfish ambitions in the cause of ignorance and incompetence.

These self-appointed emissaries of freedom seek to delude the members of the legislature. They say, with the demeanor of pathos and injury, that they have an organization of many members; that these members have worked hard to prepare themselves to do the public a lasting service; that they are better qualified to practice healing than anybody else; that, notwithstanding all their efforts and all their wisdom, these available public benefactors are oppressed by the existence of out-worn laws, originally made by enemies of the public good for their own selfish purposes; that a person who wants to benefit the people by healing the sick is prevented by these laws from doing so. They say, and keep on saying, that they have a more useful fund of information for the people than that required by the law, and that they possess the only true qualifications for healing the sick.

These disguised appeals in behalf of the people, repeated without end, finally move members of the legislature, as solemn complaints against real or fancied wrongs always have aroused and always will arouse conscientious public officers. Legislators are thus impressed and finally often misled. By pathetic appeals of personal hardship, misrepresentation of the motives of adversaries, venomous attacks on educated physicians, and artful lobbying, these preachers of low standards finally induce some legislators to suspect that the old law was formed to compel all persons to submit

to a particular and the same remedial treatment for every disease, regardless of the patient's needs or preferences, and to set up a villainous hierarchy of doctors to rule the state and tyranize over the helpless sick. These promoters of low standards declare that the law prescribes a certain form of treatemnt and a certain kind of doctor for all ailments, to the exclusion of any other form of treatment and every other kind of doctor. They contrive and speak the most prejudicial slander about their adversaries in order to set the legislative mind against them. They declare that the law provides that you have to take drugs, accept treatment for your ailments from a doctor who heals by drugs alone and does nothing else, and that nothing else is lawful. Of course, there never was a law that provided such absurdities; but everybody, including the legislator, listens to idle nonsense, and few investigate.

The man who advocates reasonable standards tries to show the legislator that the existing law sets up reasonable and uniform standards for all doctors and nothing more, like qualifications for all healers. But he often finds the legislative mind poisoned by the pretending suppliants for "justice," and sometimes ready to let down the bars to quacks and raise them still higher against physicians possessing scholarship, skill and professional integrity, ready to recognize one standard of scholarship for one cult and a different standard for another cult, but making "doctors" out of all of them. These misguided legislators are thus led to making easy the ways for the uneducated to get into the healing profession, and to making it possible for them to proceed legally in their ignoble careers of spreading disease and misery for hire.

JUL

OBJECT OF CULTS IS TO LOWER STANDARDS TO THEIR OWN DEFICIENCIES

In brief, that is the campaign of the quack. His efficient agency for promoting himself is the propagation of the healing cult. He uses one cult one time and a different cult next time. Cults are thus multiplied indefinitely. But their object is always the same, viz., to lower the legal educational requirements for becoming a doctor to meet the necessities, selfishness and deficiencies of their members, without regard to the effect of such a procedure on the public health.

BAD EFFECTS OF CULTS

Nor may it be overlooked as a practical matter that the consequences of contending sects in healing are plainly to engender bitterness among doctors, to deny to the public the helpfulness of their harmonious co-operation, to obscure their real mission to suffering men, women and children, to prevent the scientific application of all known remedial agents to all maladies irrespective of sectarian prejudice or disqualification, to lower the standards of educational requirements, to create uneducated mobs of sectarian healers who are mere money-grubbers, to set up scores of poor doctors' schools for enrichment of their proprietors, to defile legislation, destroy public confidence and debase the healing profession.

Most of these catastrophies could be avoided by the legal requirement that all healers be educated by the same standards of proficiency, and that there should be *no special privilege* given to the followers of any cult to practice healing on exemptions from this single standard of reasonable professional training. Under such a system there would be few cults, because the

selfish reason for them would be gone, and all doctors holding themselves out to the public would place the emphasis on diagnosis, and out of the world's category of therapeutic agents would cause to be applied to each particular disease that curative agent possessing the best remedial possibilities. This happy condition the people are entitled to reclaim by the enactment of statutes in conformity with the facts of life and the principles of reason.

X. Existing Statutes Are Erroneously Framed on a Theory that Tends to Perpetuate Present Cults and Will Indefinitely Create New Ones

STANDARDS ARE MADE HIGHER FOR EDUCATED DOCTORS AND LOWER FOR IGNORANT ONES

The advocates of low legal standards of educational requirements for persons following the occupation of healing the sick have succeeded in getting legislatures in many states to abandon the single standard of educational requirements for all healers, and to adopt in its place, as a special privilege to them, different standards for different kinds of healers. In such states the usual high standard of proficiency remains for educated physicians who desire to practice their profession by the open use of all therapeutic agents, including drugs and surgery; but exemptions from that standard have been created in behalf of persons who designate themselves by a particular trade name and profess to use only one specific therapy or method. Those healers in favor of whom the exemptions have been created are thereby allowed, with much less preparation, to hold themselves out to the public as doctors as fully as doctors of the higher proficiency are allowed to do.

THE POOR DOCTOR GETS THE REWARDS BELONGING TO THE GOOD ONE

The consequence is that in the public mind no doctor is any better than any other healer, regardless of training or proficiency, because all persons holding themselves out as doctors appear to the public to have the same legal status and the same unqualified indorsement by the state. The legal status is the important thing in

the public mind, because the people consider a doctor's proficiency as established by the stamp of the state's approval. They do not realize that the various persons holding themselves out as doctors possess different qualifications, and that some of them are capable of performing better service than others.

Even under statutes that require those persons who practice under a limited license to hold themselves out to the public as doctors with descriptive words of limitation, the people lose sight of the legal limitation, and look at every doctor who represents himself to the public as equal in every way to every other doctor. The limitation in the phraseology of the license, or in the manner in which the doctor holds himself out to the public, as a practical matter brings home to the people no notice of any substantial limitation. Accordingly the intention of the statute to apprise the people of a limitation is not realized.

Under such multiple standards of licensure of doctors the best prepared physician is subjected to the most exacting burdens in qualifying himself to pursue his occupation, while men of inferior qualifications, and of no qualifications whatever, hold themselves out to the public as doctors without subjecting themselves to those burdens. In other words, the most inefficient healers are given the full benefits, so far as the public confidence is concerned, and so far as public confidence can be inspired by law, of the honorable professional status actually created by the hard work and self-denial and by the ability and skill of the best physicians. This situation results in a wrong to the better qualified physicians because it gives the rewards of their work, ability and skill to men of inferior accomplishments, and a wrong to the people, because it sets up inferior men as

doctors and palms them off to the sick as men of ample proficiency. Therefore, instead of receiving the benefit of thoroughly qualified practitioners, the people are menaced by the service of doctors, vouched for by the state, of admittedly less than complete qualifications, without warning as to the danger to the individual patient of employing a doctor not completely qualified to perform the service for which the patient may call him to the bedside.

STATE FAILS TO REALIZE OBJECTS OF REGULATORY LEGISLATION

Moreover, the multiple standards of educational requirements for doctors prevent the state from rendering the particular service which it undertakes to render by a regulatory statute. While the state professedly undertakes to supply fully qualified doctors to the people, under such standards it actually abandons this intention, and supplies doctors admittedly not fully qualified to perform the required service. Under such a system those who are permitted to practice as doctors under a limited license, by only a limited method, upon only a limited number of diseases, or upon only a particular part of the body, are placed in a position to delude the people and inevitably to degrade the doctor's profession in the minds of the people by inducing them to rate all doctors by the standards of the bad ones. The object of the state to supply a well prepared physician, in whom the people may reasonably place their confidence, is frustrated by multiple standards, under which poorly prepared doctors as a matter of fact are permitted habitually to pursue the high-grade physician's occupation.

There is no defense for the policy of putting the state's stamp of approval on unqualified healers. Every doctor, regardless of his proficiency and of the therapeutic agents used by him, is habitually and necessarily called to perform *the* fundamental service for the sick, that is, to ascertain the nature of the disease which the patient has, and to direct the application thereto of the best remedial agent, without exposing the patient or subjecting the people to unnecessary danger. Therefore, no person should be permitted to represent himself as a doctor of any kind, under the state's authority, unless he is properly trained to serve initially any patient who may call him.

SPECIAL PRIVILEGES ARE EXTENDED TO THE LESS QUALIFIED DOCTORS

The practical effect of multiple standards is to extend by law a *special privilege* to the less qualified doctor. Exemptions are made in his favor from the standard provisions set up by the statute as reasonable and necessary for the protection of the public. In much of the late legislation osteopaths and chiropractors, and generally those healers pretending not to employ drugs and surgery, practice healing under the *special privilege* of being relieved from qualifying themselves as other doctors are required to do. Such a *special privilege* is illogical, because the doctors enjoying it diagnose and treat diseases; and that is the essence of the occupation, and is all that any other doctor does. Such a *special privilege* is also unfair to doctors who are required to meet the full qualifications and yet in practice are permitted to enjoy no greater actual privilege than the sub-standard practitioners. It is also prejudicial to the people, because it allows sub-standard practitioners,

confessedly not prepared in accordance with recognized standards, to attempt to cure diseases for the treatment of which standard qualifications of proficiency are required for the benefit of the patient and for the protection of the public health.

HEALING IS ONE INDIVISIBLE SCIENCE

It has become a common argument that if a healer selects one of the items of the known curative agents, and confesses his special devotion to it in treating disease, his *belief* as to what training he needs for the practice of this particular therapeutic agent is of consequence in determining what the law should require of him in the way of preparatory training. This argument needs but to be stated to exhibit its complete absurdity. It is not a question of an uneducated man's *belief* as to what he needs to qualify himself to heal diseases, but it is a question as to what should be required of him by the people in view of the profession which he undertakes to follow and of the obligations which he undertakes therein to discharge. His personal view of what his qualifications should be ought to be given no weight; and in similar situations the personal view of an ignorant man is customarily given no consideration whatever. If the *belief* of an uneducated healer is to be the basis upon which standards of educational requirements are to be established, and this idea is to be pursued logically, surgeons may not be required to study drugs or medicines, and general practitioners may not be required to study surgery, and the doctor who limits himself to the eye, or the ear, or the teeth, may not be required to study the general anatomy of the body, or the nervous system, or the action of the heart, or any of the other basic educational subjects.

The people generally accept the proposition that before a person should be allowed to hold himself out to practice a specialty in the treatment of human ailments, as that of the eye, or the ear, or the x-ray, or radium, or any other specialty, he must first have qualified himself by acquiring knowledge of all branches of the science of treating human ailments, being permitted *thereafter* to devote himself to preparation to practice his specialty. Why should an osteopath or a chiropractor be exempted from this generally accepted proposition? There is no reason; and on the basis of the logic and practical administration of the healer's functions he should not be exempted. Osteopathy or chiropractic is not a *separate* science. It is merely a part of the general science of treating human ailments. One following that method of treatment is no more discriminated against by being required to learn the fundamentals of the general science of treating human ailments, as prescribed by the legislature, than is a specialist, who confines his practice to some particular part of the body or to some particular method of treatment, but is nevertheless required to study all parts of the body, all diseases, and all forms of treatment before being permitted to practice his specialty. But under the present claims of osteopaths, who have now departed from their original doctrine of restricting themselves to massage and kneading without the use of drugs or surgery, and are claiming the right to use such drugs as they desire and to perform surgical operations, an osteopath thinks himself discriminated against when he is not permitted to practice surgery and make use of such parts of general therapeutics and materia medica as he may think himself able to employ with profit to himself. (*People* v. *Schaeffer,* 310 Ill. 574; *People* v. *Graham,* 311 Ill. 92).

PRACTICE OF ONLY ONE REMEDIAL AGENT IMPOSSIBLE

There is a false notion that if a man uses only one agent for healing a disease, such as osteopathy or chiropractic, and alleges that he intends to restrict himself to the use of one of these forms of treatment, he ought to be required to study only so much of the world's learning about diseases and their cures as will enable him to administer osteopathy or chiropractic. A mere difference in the therapeutic agents used in healing a disease is not regarded by scholars in science as a governing factor in determining the education necessary to practice the doctor's profession; nor should it be in setting the legal educational standards for the qualification of persons to hold themselves out to the people as doctors. It is the physician's business to diagnose diseases, discover their existence and nature, and to apply the *best* remedy, not a limited remedy, to the cure of them. For this task no man can be qualified who is merely engaged in indiscriminately applying one remedial agent to all ailments.

The use of various specific therapeutic agents, like massage and kneading according to the osteopathic or chiropractic methods, is improperly designated, even in some court decisions, as a "system" or "school" of treatment of human ailments. The use of such an agent is no more a "school" or "system" than the use of rhubarb or a hot-water bottle. Such curative agents are merely items in the long list of healing agents. If an ignorant man, because he knows no other method of treatment, uses only massage, or a hot-water bottle, for the treatment of diseases, he may not be said to be following the tenets of a "school" of healing science. He is merely restricting himself to one of the innumerable methods of curing diseases. Instead of receiving special

privileges by law for being a specialist in a "new school" or "new system" of healing, he ought to be denied the right to practice healing at all, because of his ignorance of most of the world's known curative methods.

THE LAW MUST PROVIDE FOR GENERAL PRACTITIONERS

A standard of qualification, complying with which a doctor may practice on any part of the human body, on any disease to which man is heir, or by any remedial agent known to the world, without limitation, is necessary as a practical matter. It is not feasible to make all doctors specialists. Moreover, there manifestly must be the general practitioner with a wide acquaintance with all therapeutic agents and means and methods of healing. It is apparent that without him every small center of population, in order to receive the healing service necessary for its people, would be required to have a specialist in every branch of medical science. Such a requirement would deny necessary curative service to many people. The general practitioner is not only necessary for service in such localities, but he is primarily necessary in all localities as the first possible and convenient aid to be called by the patient, even though a specialist may later be found to be required. The standard for such a general practitioner must necessarily be fixed by the legislature as the standard of qualification for general unlimited practice.

MULTIPLE STANDARDS AND MULTIPLE BOARDS ARE EVILS

While multiple standards in themselves are unjustifiable, and thwart the state in discharging its obligation to the people, their vice is intensified by the establish-

ment, as is done in some states, of multiple sectarian boards of examiners to license applicants who purpose to use different healing methods. In some states there is one board for licensing the fully qualified physicians and surgeons, another for licensing homeopaths, another for licensing eclectics, another for licensing osteopaths, another for licensing chiropractors, and others for granting licenses to members of still different groups. If the multiplication of boards has stopped at any point, it is *only* because the followers of the innumerable other kinds of healing have not had enough political power to get separate boards for their particular cults. The logic of the situation would require under that system a separate board for every therapeutic agent. Ultimately, as different healing agencies should be promoted by advertising, for the creation of organized cults to give influence to their followers, the advocates of each therapeutic agent would have the logical right to a state administrative board of examiners of their own; notwithstanding that every physician has it within his reasonable accomplishment to direct the administration of all therapeutic methods, and that parceling them out to innumerable advocates of special remedies is unnecessary and undesirable; and notwithstanding that the only object which the state can legitimately have in regulating the physician's occupation is to supply to the people well trained doctors of broad information and skill in diagnosing diseases and apply thereto the best remedies known to the world.

Under a multiplicity of boards there is an unnecessary economic waste in sustaining them. There is also the waste of administrative management and supervision incident thereto. There is, moreover, the conflict that comes from the various standards of educational

preparation naturally set up in multiple administrations. Furthermore, the existence of numerous boards and of multiple standards accentuates and keeps alive numerous warring cults that interfere by their partisanship with the nonsectarian application of all remedial methods to diseases according to the dictates of science.

The object of the state to provide a well trained profession, therefore, is doubly nullified by multiple standards and multiple boards, under which inferior standards receive the state's approval and are perpetuated from year to year by new cults, new boards and continuous propaganda for dividing the practitioners of healing into inter-repellant, warring groups accentuating trivialities and preventing the direction of the power of the state upon the creation of a great profession under a single standard of efficiency for the benefit of the public health.

XI. The Standard Uniform Regulation Should Apply to Professional Healers Promoting Religious Organizations or Religious Propaganda by Their Treatment of Diseases

STATUTORY EXEMPTION OF RELIGIOUS HEALERS

Most of the acts regulating the occupation of healing the sick contain provisions for exempting from their scope the practice of religious tenets or the beliefs or ministrations of any church. Many of these exemptions are illogical, ill-founded in necessity and offensive to one's sense of substantial justice. If they go merely to the exemption of the free exercise and enjoyment of religious profession or worship under the constitution they are unnecessary, because such constitutional rights prevail regardless of statutory enactments. Most of these provisions undoubtedly are inserted because those who promote them know that their alleged religious exercises are not protected by the constitution as the enjoyment of religious profession or worship.

The question of fact, whether a particular transaction is the exercise of religious profession or worship, or of the tenets of a church, is not a difficult one. Whether the act in question is one of religious profession or worship, or is merely the service of a healer in the pursuit of his occupation for pay is generally apparent.

I am of the opinion, as we all are, that there ought to be no interference with the free exercise and enjoyment of religious profession or worship. But I am also of the opinion that statutory enactments ought not to be contrived to exempt from the just regulation of the occupation of healing those who under the name of religion pursue healing as an occupation for pay. All

persons who hold themselves out to the public as being engaged in the occupation of healing the sick for hire ought to be brought under the regulating statute, regardless of their religious pretensions, ministrations or connections, and be made to conform to the single statutory standard of education and proficiency.

RELIGIOUS FREEDOM VS. ILLEGAL BUSINESS AND THE PRACTICE OF HEALING UNDER THE CLOAK OF RELIGION

The common exemption of the practice of the "religious tenets of a church" is of course defective, because the law can give no fair or defendable preference to the religion of a church member over the religion of a person who is not a church member. Such a provision must be held to exempt the religious tenets of any person to the same extent that it exempts the religious tenets of a church. Some persistent quacks have attempted to enjoy this type of exemption by incorporating themselves into a church society in order to carry on their business of healing for pay under the privileges of churches unrestrained by the law, but they have met insuperable barriers in the courts, which have not been overawed by mere church machinery.

The Supreme Court of Colorado, in Smith v. the People, decided in 1911, had under consideration, for practicing medicine without a license, a man who had organized a church by means of which he was conducting his business of healing. He did not use drugs or practice surgery in any manner. He contended that he was not liable to the penalty sought to be imposed upon him on account of the exemption in the statute of the "practice of the religious tenets or general beliefs of

any church whatsoever, not prescribing or administering drugs." The court said:

It is the nature of the defendant's business, not the objects of the corporation or the tenets of his church, that is in controversy. The evidence shows he was practicing medicine within the definition of the statute, and was using the title "healer" to his name to indicate that he was engaged in the business of healing the sick. He treated in his office, or place of business, for hire, persons suffering from disease, for the purpose of curing them. He held himself out to the public as a professional healer of diseases, and a practitioner of the healing art. The statute lays hands on commercial healing as a money-making occupation, business, or profession, regardless of the method of treatment or curative agency employed. . . . The constitution provides there shall be no interference with the "free exercise and enjoyment of religious profession and worship." . . . The statute does not interfere with the free exercise of religion or worship. Any person individually or collectively, any minister, or any church congregation may resort to prayer whenever they wish for the healing of the sick. No attempt is made to interfere with religion or religious devotions. This does not, however, authorize one under the cover of religion or a religious exercise to go into healing commercially for hire, using prayer as the curative agency or treatment. Religion cannot be used as a shield to cover a business undertaking. Defendant was engaged in a business venture, not a religious exercise. The practice of medicine, defined by our statute, means the practice of the healing art commercially, regardless of the curative agency employed. The commercial practice of healing by prayer followed as a money-making venture or occupation, is the practice of medicine within the plain meaning of the statute. (*Smith* v. *The People,* 51 Colo. 270; 117 Pac. 612.)

The views of the courts respecting the connection between the practice of religion and the practice of

healing, appearing to me to be sound, are illustrated by that Colorado case and by other cases to which I shall now refer.

The Supreme Court of Nebraska in State v. Buswell, in 1894, had under consideration a Christian scientist, who relied upon the teachings of the Bible. The court in a celebrated opinion referred first to the eighth chapter of the Acts of the Apostles about Simon and quoted therefrom, and then said:

In the light of these instances cited from defendant's own authority, it is confidently believed that the exercise of the art of healing for compensation, whether exacted as a fee or expected as a gratuity, cannot be classed as an act of worship. Neither is it the performance of a religious duty, as was claimed in the district court. There is no claim in this case that compensation, in one or the other of these methods, was not accepted when tendered. The evidence affirmatively shows the contrary. Not only is this true, but we find a very considerable part of defendant's brief devoted to an argument as to the inefficiency of the established and recognized modes of treatment in the cure of diseases, as compared with defendant's method, as tested by the results attained. The evidence upon which the case was tried convinces us that the defendant was engaged in treating physical ailments of others for compensation. He was within none of the exceptions provided by statute. The instruction which required that, to a conviction, he should be found guilty of practicing medicine, surgery, or obstetrics, as generally or usually understood, was erroneous. The object of the statute is to protect the afflicted from the pretensions of the ignorant and avaricious, and its provisions are not limited to those who attempt to follow beaten paths and established usages. The conservatism resulting from the study of standard authors might be somewhat depended on to minimize the evils attendant upon unlicensed practitioners' attempts to follow regular and approved methods, although, as against even these, the law should be

enforced. Still more stringently should its provisions be rendered effective against pretensions based upon ignorance, on the one hand, and credulity, on the other. The statute does not merely give a new definition to language having already a given and fixed meaning. It rather created a new class of offenses, in clear and unambiguous language, which should be interpreted and enforced according to its terms. Under the indictment the sole question presented, upon the evidence, was whether or not the defendant, within the time charged, had operated on, or professed to heal, or prescribed for, or otherwise treated, any physical or mental ailment of another. There was involved no question of sentiment, nor of religious practice or duty. If the defendant was guilty as charged, neither pretense of worship, nor of the performance of any other duty, should have exonerated him from the punishment which an infraction of the statute involved. (*State* v. *Buswell,* 40 Neb. 158; 58 N. W. 728.)

The Supreme Court of Ohio, in 1905, in a famous opinion in State v. Marble, having under consideration a Christian scientist, said:

The next contention is that the statute interferes with defendant's right to worship God according to the dictates of his conscience. No specific provision of the constitution is referred to. Section 7 of our bill of rights provides: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience . . . nor shall any interference with the rights of conscience be permitted." It is to be observed that the statute does not prohibit the prescribing or recommending the treatment except for a fee, and we are not advised that it is a part of defendant's religion to exact a fee as well as to pray. But if the inhibition of the statute tends to the public welfare, and is not obnoxious on other grounds, it is not within this provision of the bill of rights. In Bloom v. Richards, 2 Ohio St. 387, Thurman, J., says: "Acts evil in their nature, or dangerous to the public welfare, may be forbidden and punished, though

sanctioned by one religion and prohibited by another; but this creates no preference whatever, for they would be equally forbidden and punished if all religions permitted them. Thus, no plea of his religion should shield a murderer, ravisher, or bigamist; for the community would be at the mercy of superstition if such crimes as these could be committed with impunity because sanctioned by some religious delusion." In Reynolds v. United States, 98 U. S. 145, after showing historically how religious freedom came to be guaranteed by amendment to the constitution of the United States, Chief Justice Waite considers what is meant by religious freedom and concludes: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." (*State* v. *Marble*, 72 Ohio St. 21; 73 N. E. 1063.)

The Supreme Court of Kansas, in State v. Peters, in 1912, said:

The claim of the appellant that he only practiced a religious belief within the exception, which declares that nothing in the act shall be construed to interfere with any religious beliefs in the treatment of diseases, cannot be sustained. The only basis for this claim is the appellant's testimony that he believed the words of Jesus in regard to healing; that from Bible study and supplemental study of psychology and suggestive therapeutics he believes that he can carry out this healing practice to some extent; and that it is his duty to do so. Still the fact remains uncontradicted that he diagnosed diseases and treated patients in a matter of fact way by manipulations and rubbing. He was thus treating people as a business, for compensation, by outward physical means, and was not engaged merely in a religious observance, or, as counsel say, "practicing a religious belief." (*State* v. *Peters*, 87 Kan. 265; 123 Pac. 751.)

When the occupation of healing the sick is carried on as an occupation for hire, regardless of the spiritual

or material form of the curative agent, it may not logically be considered entitled to any special privilege or exemption on the ground that it is the exercise and enjoyment of religious profession or worship; no more than shipping misbranded foods in interstate commerce may be made the basis of an exemption from prosecution on the ground that this sort of business is pursued as an exercise of the defendant's religious tenets. Even religion must begin and end somewhere.

XII. Special Official Agencies Must Be Provided for the Administration of the Regulatory Statutes

special service required

Statutes prescribing the requisite regulation of the doctor's occupation will not enforce themselves. Neither are they enforcible by the ordinary public officers charged with general administration of the laws. Special officers must be provided capable of performing the peculiar services required in the administration of such statutes. They must conduct examinations in scientific subjects and scientific technic that can be conducted only by experts in those matters. They must maintain intimate acquaintance with and an indirect influence over schools and colleges for instruction of students in the appropriate subjects in order to keep such means of instruction abreast of the world's ever increasing scientific knowledge. They must possess and apply accurate judgment of the moral qualifications of applicants in admitting persons to the doctor's occupation. They must gather information about the professional conduct of persons engaged in the profession. They must enforce the regulatory provisions respecting the suspension and revocation of licenses, bringing to the attention of the proper prosecuting officers alleged violations of the penalty clauses of the statute. The proper discharge of such duties manifestly requires peculiar and more than the ordinary administrative talents.

Officers discharging such duties are commonly selected by the governor or by a high officer appointed by the governor and acting under his supervision. There is manifestly no better method of choosing officers for the discharge of such duties. Admittedly they

must possess sound qualifications therefor, because their administration touches the most important considerations for the people, for applicants for licensure, and for members of the profession.

BROAD QUALIFICATIONS OF ADMINISTRATORS

The technical education required for the performance of such duties is necessarily the first requirement. The peculiar nature of the technical information and skill required for conducting the necessary examinations has uniformly brought to these authoritative positions practicing physicians of marked learning, skill and professional standing. Persons from this class are manifestly and necessarily the persons peculiarly qualified for the discharge of the particular official duties.

Most desirable and necessary characteristics of persons suitable for appointment to a board discharging these official duties are judicial acumen and fairness, impartiality, courage, industry and a keen regard for the just rights of all persons over whom they exercise their jurisdiction. No other virtues will take the place of these in the discharge of such important legal obligations.

The success of the administration of such a law, in fact the confidence of the people in the availability of statutory regulations of this sort, depend upon the high character of the board of examiners and their judicial and educational qualifications for the discharge of their official obligations. They should be carefully selected, with a view of applying the provisions of the statute with justice, without cruelty to persons coming under their jurisdiction, and without disregard for the important things with which they deal in the lives of the persons over whom they exercise authority. Quite as

important, however, is the courage to enforce the right judgment regardless of personal consequences.

FUNCTION OF STATE LICENSING BOARDS

The function of the necessary administrative board is amply stated in the decisions of the courts. In Douglas v. Noble, decided in 1922, the Supreme Court of the United States, speaking of the administration of such duties, with reference to dentists, said:

> What authority the statute purports to confer upon the board is a question of construction. If it purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to the applicant's qualifications to practice dentistry, the statute would, of course, violate the due process clause of the fourteenth amendment. Its construction is a question of state law. Since the case is here on appeal from a federal court, we must consider it. But in passing upon such questions we follow applicable decisions of the highest court of the state. . . . Whether the applicant possesses the qualifications inherent in that standard is a question of fact. The decision of that fact involves ordinarily the determination of two subsidiary questions of fact; the first, what the knowledge and skill is which fits one to practice the profession; the second, whether the applicant possesses that knowledge and skill. The latter finding is necessarily an individual one. The former is ordinarily one of general application. Hence it can be embodied in rules. The legislature itself may make this finding of the facts of general application, and by embodying it in the statute make it law. When it does so, the function of the examining board is limited to determining whether the applicant complies with the requirements so declared. But the legislature need not make this general finding. To determine the subjects of which one must have knowledge in order to be fit to practice dentistry, the extent of knowledge in each subject, the degree of skill requisite, and the procedure to be followed in conducting the

examination—these are matters appropriately committed to an administrative board. And a legislature may, consistently with the federal constitution, delegate to such board the function of determining these things, as well as the functions of determining whether the applicant complies with the detailed standard of fitness. Reetz v. Michigan, 188 U. S. 505. That the scope of the discretion here granted to the examining board was well within the limits allowed by the federal constitution, and that it is not to be presumed that powers conferred upon the administrative boards will be exercised arbitrarily, is settled by Lieberman v. Van de Carr, 199 U. S. 552. (Douglas v. Noble, 261 U. S. 165; 43 Sup. Ct. 303.)

MORAL GROUNDS FOR REFUSAL OR REVOCATION OF LICENSES

Specific provisions of law are manifestly necessary in order to establish and enforce reasonable regulations relative particularly to the moral conduct of practitioners of healing. This view is widely accepted by the people and by the courts and legislative bodies of the United States, and requires here no argument in support of it. The legislatures of our various states have passed and regularly maintain definite provisions of law providing for the refusal, suspension or revocation of physicians' licenses on moral grounds that are commonly accepted as just and necessary.

Such grounds may be summarized as follows: procuring or attempting or aiding to procure a criminal abortion; the conviction of a felony; gross malpractice resulting in permanent injury or the death of a patient; obtaining a fee on the fraudulent representation that a manifestly incurable condition of sickness, disease or injury of any person can be permanently cured; habitual intemperance in the use of ardent spirits, narcotics or stimulants to such an extent as to incapacitate the practitioner for performance of his professional duties;

holding himself out to treat human ailments under any name other than his own, or the personation of any other practitioner; having been declared insane by a court of competent jurisdiction and not having thereafter been declared lawfully sane; employment of fraud, deception or any unlawful means in applying for or securing a license to practice, or in passing an examination therefor, or wilful and fraudulent violation of the rules and regulations of the examiners; holding one's self out to treat human ailments by making false statements, or by specifically designating any disease or group of diseases and making false claims of one's skill or of the efficacy or value of one's medicine, treatment or remedy therefor; professional connection or association with, or lending one's name to another for illegal practice by another, or professional connection or association with any person, firm or corporation acting in a manner contrary to the regulatory act; unprofessional or dishonorable conduct.

The regulatory act commonly provides for a hearing before the examining board for any person charged with one of these derelictions, and the procedure to be followed in such a hearing is sometimes specifically set forth in the statute. The action of the examiners in refusing, suspending or revoking a license on such grounds is commonly reviewable by the courts, not for ascertaining the facts, but for determining whether the board properly applied the law to the facts ascertained by it. Procedure of this sort protects the practitioner and the public, and is wholesome and wise.

UNPROFESSIONAL OR DISHONORABLE CONDUCT

The last of the grounds mentioned, that of unprofessional or dishonorable conduct, is one of the most

necessary, though it is sometimes refused admission to a statute on account of its wide and general application to derelictions. But a physician's conduct toward his patient, and also toward the public health, may be so harmful, disgraceful, diabolical or infamous as to make his continuance in the profession a public wrong, yet no other ground than that of unprofessional or dishonorable conduct may enable the authorities to revoke such a physician's license. This ground ought to be stated in the law, so that it may be used for the protection of the people in cases in which a specific ground is not stated because the particular offensive acts are unusual, entirely unforseen, or as a matter of expediency too much subjects of detail to be specifically enumerated in the statute.

A curious situation exists, with respect to the refusal, suspension and revocation of licenses in Illinois on the ground of unprofessional or dishonorable conduct, which illustrates some of the difficulties of maintaining legal moral standards for doctors. The first act passed by the legislature regulatory of the practice of medicine in that state became effective in 1877. It included the ground of unprofessional or dishonorable conduct, and that ground remained in the law continuously until 1923, when it was left out of the revision of the regulatory legislation because the advocates of low standards opposed it as especially threatening to them. That reason for omitting it was manifestly insufficient, and reflects no credit upon those who procured its omission. In all the history of the state from 1877 there is no record that this ground for refusal, suspension or revocation was ever misused, and it is not conceivable that men of the character appointed to administer such regulatory legislation would misuse it. The natural

tendency of administrative officers to do justice in a proceeding of that sort is reinforced by the ample jurisdiction to review which the courts possess.

In People v. McCoy the Supreme Court of Illinois had under consideration the purported revocation of a license on the then existing statutory ground of unprofessional or dishonorable conduct. The court said:

> It may be conceded that . . . the state board of health had power to revoke certificates issued to individuals to practice medicine for the same reasons it might refuse to issue such certificates, viz., for unprofessional or dishonorable conduct. The statute in this respect, however, must have a reasonable construction. The board cannot from mere caprice or without cause revoke a certificate fairly issued upon sufficient evidence of the applicant's qualifications. The right of the citizen to practice his profession, for which he has expended time and money to qualify himself, is too important to be taken away from him without some reasonable cause. It must be for some act or conduct that would in the common judgment be deemed unprofessional or dishonorable.

The Illinois court also said in the McCoy opinion:

> Had the board found him guilty of the charge alleged against him,—that he had made statements and promises calculated to deceive and defraud the public,—that, indeed, would have been unprofessional and dishonorable conduct. (*People* v. *McCoy,* 125 Ill. 289.)

It is apparent from this decision that the court regarded unprofessional or dishonorable conduct as sufficient ground upon which to revoke a physician's license. This view is generally sustained by the courts throughout the country, though a view to the contrary has been expressed by one court.

The Supreme Court of Minnesota has said:

The complaint sets out, in full, the advertisement in which relator, among other things, asserts to the public his ability to speedily cure all chronic nervous, blood, and skin diseases of both sexes; also all diseases of the eye and ear, without injurious drugs or hindrance from business; all old, lingering constitutional diseases, where the blood is impure, causing ulcers, blotches, sore throat and mouth, pains in the head and bones, cured for life, etc. The complaint further charges that relator published this advertisement for the purpose of soliciting and procuring, wrongfully and fraudulently, patients to submit themselves to medical treatment by him; and that the statements therein contained are false, and that relator well knew them to be false when he made them, and that it was intended thereby to deceive the public and impose on the credulous and ignorant. The gist of this charge is, not that he advertised his business, nor merely that the statements contained in the advertisement were false, but also that relator knew them to be false, and made them with intent to deceive and impose on the public. If true, this is unprofessional and dishonorable conduct of the grossest kind. (*State* v. *State Board,* 34 Minn. 391.)

OBTAINING MONEY FOR PROMISING TO CURE INCURABLE CASES

Illustrative of the problem presented by resort to judicial decisions in this phase of regulation, I may cite a decision by the Supreme Court of Colorado, Graebe v. State Board, 47 L. R. A. (N. S.) 1063, and another by the Supreme Court of Oklahoma, Freeman v. State Board, L. R. A. 1916 D, 436. These decisions involve a method provided in many statutes for preventing a dishonest doctor from carrying on a despicable form of fraud, that of revoking the license of a practitioner on the ground of his "obtaining a fee on the representation that a manifestly incurable disease

can be permanently cured." I presented the Colorado case to the supreme court of that state in support of the revocation of the license.

Most unaccountably to me, it was urged before the court by my opponent for his physician client that such a provision for revoking a doctor's license is an interference with progress in the development of means and methods of healing the sick. The same point has often been urged in legislative chambers as well as in the courts, and urged with great vehemence and pretended show of the deepest devotion to the cause of medical progress.

Promises of cures, under the most favorable and proper circumstances, are not especially prized by the people; nor is progress in the science of medicine in any particular dependent upon them. Be that as it may, this statutory provision does not prohibit them. But in what respect does medical progress depend upon permitting a physician to obtain a fee on the representation to his patient that he can permanently cure him of a disease which has progressed to such a stage that it is manifestly incurable? Such a statutory provision still permits a physician to treat and try to cure any condition of disease, whether curable or incurable, and to receive pay for doing so. It probably even does not prohibit him from promising to cure a manifestly incurable disease, treating that disease, and receiving pay for the treatment. It certainly permits him to give to his patient every necessary and desirable assurance of improvement and final recovery of health. But it does not permit him to obtain a fee on the representation that he can cure a disease which is manifestly incurable. It does not permit him to flim-flam his dying patient out of money by the use of false and fraudulent promises

of the certainty of restoring health irreparably lost. The fee and the fraudulent promise constitute the gist of this statutory offense.

What has an enactment of this sort to do with progress in medicine? When did progress in medicine depend upon allowing a physician to extort money from a dying man wholly on the false and fraudulent assurance that he can cure him? When did it become necessary to the progress of medicine that a dying man should be allowed to be induced to give his money to a physician merely because that physician has over-borne his judgment by false promises and without warrant represented himself to be able to cure him?

If a man's condition is manifestly incurable and he accepts the services of a physician and pays for those services wholly because of the physician's representations that he can permanently cure him, the law should require the revocation of that physician's license. Nor do good morals require less. And medical progress is not concerned.

The Colorado court refused to adopt my opponent's contention about scientific progress, but adopted another made by him, viz., that this ground for revoking a license was ineffectual because the word "disease" designated a specific disease, as if by name, as tuberculosis or cancer; that no disease in that sense could be said to be manifestly incurable as such, and that accordingly the legislature was without power to provide for revoking a license on that ground. The court comprised seven judges, three of whom dissented, writing a separate opinion and approving the interpretation which I had suggested, that "disease," as used in the statute, meant diseased condition.

The same question afterwards arose in the Oklahoma case which I have cited, and the supreme court of that state unanimously adopted my interpretation, and the doctrine of the dissenting opinion in the Colorado case, holding that the word "disease" meant any disease which had reached an incurable stage, according to the state of knowledge of the medical profession at that time, a conclusion which undoubtedly represented the intention of the legislature in both states.

The function of the administrative boards with reference to the refusal or revocation of licenses, and with reference to their method of action, procedure and jurisdiction, have been stated with much particularity in court opinions in connection with the enforcement of regulations respecting moral standards. Extended consideration will be given to this phase of administration under a subsequent head.

XIII. Individual States of the United States Have Legal Power to Regulate the Physician's Occupation

POLICE POWER

Certain powers of the state have come to be called collectively the police power. This power inheres in every sovereignty. It is the power to govern men and things, extending to the protection of the life and limb, health, comfort, and quiet of all persons, and to the maintenance of their security from the consequences of ignorance, incapacity, deception and fraud. The exercise of the police power is the exercise by the body politic of the analogous personal right or principle of self-preservation. It embraces the whole system of internal regulation by which the state seeks, not only to preserve the public order and to prevent offenses against itself, but also to establish for the intercourse among citizens those rules of good manners and good neighborhood which prevent conflict of rights and insure to every person uninterrupted enjoyment of himself and his possessions consistently with a like enjoyment by others. It extends to all the great public needs.

In our federated republic the general police power, outside of the domain of the special powers exercised by the federal government under the federal constitution, resides in the component commonwealths and is exercised almost entirely by them, but under the restraints imposed by the powers exercised by the federal government.

The constitution of Massachusetts contains this declaration:

A body politic is a social compact by which the whole people covenant with each citizen, and each citizen with the whole

people, that all shall be governed by certain laws for the common good.

The Supreme Court of the United States, speaking approvingly of this declaration by Mr. Chief Justice Waite, said:

This does not confer power upon the whole people to control rights which are purely and exclusively private; but it does authorize the establishment of laws requiring each citizen so to conduct himself, and so use his property, as not necessarily to injure another. This is the very essence of government. . . . (*Munn* v. *Illinois*, 93 U. S. 124.)

GENERAL STATEMENT OF THE LAW

It is settled beyond controversy, in the jurisprudence of the United States and of the several states, that laws may be enacted governing the practice of the occupation of healing diseases, and generally of caring for sick and injured human beings; and that this authority emanates from the police power and from that phase of the police power pertaining to the protection of the public health.

The Supreme Court of the United States, speaking, in 1889, by Mr. Justice Field, said:

It is undoubtedly the right of every citizen of the United State to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. . . .

But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of decep-

tion and fraud. As one means to this end it has been the practice of different states, from time immemorial to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the state to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with

which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected. . . . We perceive nothing in the statute [under consideration] which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications. (*Dent* v. *West Virginia,* 129 U. S. 114.)

The same high court, speaking much later by Mr. Justice Brewer, said:

No precise limits have been placed on the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. (*Hawker* v. *New York,* 170 U. S. 192.)

And later, speaking for that court, Mr. Justice Brewer said:

> The power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine and punishing those who attempt to engage therein in defiance of such statutory provisions, is not open to question. (*Reetz* v. *Michigan,* 188 U. S. 505.)

As late as 1910 the Supreme Court of the United tates reaffirmed these various expressions in the following language:

> It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine. Dealing, as its followers do, with the lives and health of the people, and requiring for its successful practice general education and technical skill, as well as good character, it is obviously one of those vocations where the power of the state may be exerted to see that only properly qualified persons shall undertake its responsible and difficult duties. To this end many of the states of the union have enacted statutes which require the practitioner of medicine to submit to an examination by a competent board of physicians and surgeons, and to receive duly authenticated certificates showing that they are deemed to possess the necessary qualifications of learning, skill, and character essential to their calling. (*Watson* v. *Maryland,* 218 U. S. 173.)

In a case in which the practice of Christian science was held to be, as a matter of law, "the practice of medicine," the Supreme Court of Ohio said:

> That the practice of medicine may be regulated by legislation has been decided in every court in which the question has arisen. (*State* v. *Marble,* 72 Ohio St. 21).

The Supreme Court of California, in 1904, said:

In fact it must be conceded that it is a common and valid exercise of legislative power to prescribe regulations under which only those persons possessing proper qualifications shall be admitted to the practice of any profession or calling requiring special skill. This right of legislation is always recognized as a salutary and wise exercise of the police power of the state for the protection and safety of the public against unskillful and incompetent persons.

It is apparent from judicial decisions and statutes that courts and legislators, in using the phrase, "the practice of medicine," and generally in dealing with the healing of the sick, have in mind not a specific kind of healing or a specific remedial agent used by any particular sect or school, but the *occupation* as such in its broadest aspects; and that the thing uniformly intended to be regulated is not any particular therapeutic agent but the entire occupation of healing the sick for hire, regardless of remedial agents or therapeutic theories. The reason for this has been explained in the preceding discussion.

LAW OF THE REVOCATION OF LICENSES

Authority of the legislatures under the constitutions of the various states and under the constitution of the United States to provide for the revocation of doctor's licenses has been recognized by all of the courts and is now unassailable.

The Supreme Court of Minnesota has said:

It may be stated as a general proposition that any person has a right to pursue any lawful calling, but in respect to certain occupations, not in themselves unlawful, this right is necessarily subject to legislative restrictions from considerations of public policy. In the profession of medicine, as in

that of the law, so great is the necessity for special qualifications in the practitioner, and so injurious the consequences likely to result from a want of it, that the power of the legislature to prescribe such reasonable conditions as are calculated to exclude from the profession those who are unfitted to discharge its duties, cannot be doubted. (*State* v. *State Medical Board,* 32 Minn. 324.)

The Supreme Court of Arizona has said:

It is too well settled to admit of discussion that the state, in its exercise of the police power, . . . may commit to a board created by it the . . . power, after notice and opportunity to be heard, to revoke the license of any who become disqualified either morally or intellectually. (*Aiton* v. *Board,* 13 Ariz. 354; 114 Pac. 962.)

This statement of the law is undisputed and is supported by many decisions by the highest courts in the various states and by the Supreme Court of the United States.

A BOARD MAY REVOKE LICENSES

This power of revocation may be vested by the legislature in a board with authority to investigate and try the charge which may be made on a statutory ground for revocation. The act of revocation of a license is not an exercise of judicial power. Due process of law is not necessarily procedure by a judicial tribunal. Private rights and enjoyment of property may be interfered with by the legislative or executive, as well as the judicial, departments of government. The Supreme Court of the United States, speaking in 1903, said:

The decision of the state supreme court is conclusive that the act does not conflict with the state constitution, and we know of no provision in the federal constitution which forbids a state from granting to a tribunal, whether called a court or

a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not necessarily judicial process. (*Reetz* v. *Michigan,* 188 U. S. 505.)

COURT REVIEW NOT NECESSARY

While under general direction of law, courts ordinarily have some authority to review the acts of boards of examiners, such right to review may be limited to the authority of the court under the common law certiorari proceeding to determine whether the law has been properly applied to the facts found by the board. The Supreme Court of the United States, speaking on this subject, said:

Neither is the right of appeal essential to due process of law. In nearly every state are statutes giving in criminal cases of a minor nature a single trial without any right of review. For nearly a century trials under the federal practice for even the gravest offences ended in the trial court, except in cases where two judges were present and certified a question of law to this court. In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted. (*Reetz* v. *Michigan,* 188 U. S. 505.)

REVOCATION IS NOT A CRIMINAL ACTION

Nor is the character of the proceeding before the board criminal in its nature. The Supreme Court of the United States has said:

It is further insisted that having once engaged in the practice, and having been licensed so to do, he had a right to continue in such practice, and that this statute was in the nature

of an *ex post facto* law. . . . The statute does not attempt to punish him for any past offense, and in the most extreme view can only be considered as requiring continuing evidence of his qualifications as a physician or surgeon. (*Reetz* v. *Michigan,* 188 U. S. 505.)

SAME BOARD MAY GRANT AND REVOKE LICENSES

The same board may possess the power to revoke a license as well as the power to grant it. The Supreme Court of Minnesota has said:

. . . there is no possible distinction in this respect between refusing to grant a license and revoking one already granted. Both acts are an exercise of the police power. The power exercised and the object of its exercise is in each case identical, viz., to exclude the incompetent or unworthy person from this employment. Therefore the same body which may be vested with the power to grant or refuse to grant a license may also be vested with the power to revoke. (*State* v. *State Board,* 34 Minn. 387.)

The Supreme Court of Minnesota has also said:

And as the duty of determining upon these qualifications, both as to learning and skill, and as to honor and moral fitness, must from necessity be committed to some person or body other than the legislature, we see no reason why it may not be committed to the legally constituted body of men, learned in this profession, named in this act. (*State* v. *State Board,* 32 Minn. 324.)

PROCEDURE FOR REVOCATION NOT REQUIRED TO BE SAME AS COURT PROCEDURE

The procedure before such a board is not restricted to the procedure commonly used in the courts. Upon that point the Supreme Court of Kansas has said:

It is contended that the procedure before the board in the admission and rejection of evidence was violative of the rights

of Meffert, in that the evidence received and acted upon was made up largely of unsupported accusations, hearsay, and street rumor, and was not sufficient to sustain the findings. The provisions of the act creating the board plainly indicate that such investigation was not intended to be carried on in observance of the technical rules adopted by courts of law. The act provides that the board shall be composed of seven physicians. These men are not learned in the science of law, and to require of a board thus composed that its investigations shall be conducted in conformity to the technical rules of a common-law court would at once disqualify it from making any investigation. It is subversive of the morals of the people and degrading to the medical profession for the state to clothe a grossly immoral man with authority to enter the homes of her citizens in the capacity of a physician. It was the intention of the legislature to adopt a summary proceeding by which the morals of the people and the dignity of the profession might be protected against such a possibility, without being embarrassed by the technical rules of proceedings at law. (*Meffert* v. *State Board*, 66 Kan. 710.)

REVOCATION NOT NECESSARILY BASED ON PROFESSIONAL RELATIONS

Neither is it necessary that the act on account of which the revocation was made be one rising out of the physician's professional relations. With respect to that point the Supreme Court of Kansas has said:

It is contended that the immoral conduct with which plaintiff in error was charged was not practiced by him in the line of his profession, and therefore not cognizable by the board. The law is not that the board must find that such person has been grossly immoral with his patients, but that he is grossly immoral in his general habits. We only mention this contention to condemn it. The object sought is the protection of the home of the sick and distressed from the intrusion therein, in a professional character, of vicious and unprin-

cipled men—men wholly destitute of all moral sensibilities. It was not the purpose of the lawmakers to clothe a man with a certificate of moral character, and send him out to prey upon the weak and unsuspecting—upon those who would be entirely at his mercy—and quietly await the accomplishment of that which observation and experience have taught us is certain to follow, before depriving such person of the indorsement which gave the opportunity to commit such wrong. The law disqualifies one guilty of a felony. It would hardly be contended that the felony for which a license may be revoked must have been committed upon a patient, or against the property of a patient, or while such physician was attending a patient. (*Meffert* v. *State Board,* 66 Kan. 710.)

AS TO EX POST FACTO

Nor is the board prevented from revoking a license because the acts for which the license was revoked were committed before the passage of the law authorizing the revocation. The Supreme Court of Kansas has said:

The revocation of a license to practice medicine for any of the reasons mentioned in the statute was not intended to be, nor does it operate as a punishment, but as a protection to the citizens of the state. Such requirements go to his qualifications, and, where the qualification imposed is reasonable, one has no right to complain that he is deprived of the right to practice his profession because he has not conformed to such reasonable regulations. The legislature has empowered the different cities of the state to assess a business license tax upon nearly all kinds of trades, professions, business, and occupations, upon the payment of which, and in some instances the conformity to other reasonable regulations, the city issues to such persons a license to carry on such business, occupation, profession, or trade; and for the nonperformance of such condition, or nonpayment of the stipulated license, such permission may be cancelled or withheld. It has never been

thought that the withholding or revocation of such lisense was in any sense a punishment. If the revocation was intended as a punishment, there might be force in this argument, but, since the only purpose of the law was to require a certain standard of morals of the physician, the argument is without force. (*Meffert* v. *State Board,* 66 Kan. 710.)

The Meffert decision by the Supreme Court of Kansas was affirmed by the Supreme Court of the United States. (Meffert v. Parker, 195 U. S. 625).

The most important case on this point is Hawker v. The People of New York, decided by the Supreme Court of the United States in 1898. In that case the single question presented was the constitutionality of a New York statute making a conviction of a crime before the statute was passed conclusive evidence of lack of good moral character as a necessary qualification for engaging in the practice of medicine. It was urged that the statute conflicted with that provision of the federal constitution forbidding a state from passing an *ex post facto* law. The statute provided a penalty to be imposed upon any person who, after being convicted of a felony, should practice medicine. Hawker was convicted of the felony in 1878. The statute prohibiting a physician from practicing medicine after having been convicted of a felony was passed in 1895. Being indicted for practicing medicine in violation of the statute, Hawker demurred to the indictment on the ground that he had already atoned for the felony by imprisonment in the penitentiary, that the right to practice medicine was a valuable property right, that the legislature did not have power to impose additional punishment by preventing him from practicing medicine, and that such additional punishment would be *ex post facto.* Stating these facts the court said:

THE CONVICTION OF A CRIME INDICATES WANT OF MORAL QUALIFICATION

On the other [hand] it is insisted that, within the acknowledged reach of the police power, a state may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine. It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the state is not possessed of sufficient good character, it can deny to such a one the right to practice medicine; and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law, and of the absence of the requisite good character. In support of this latter argument, counsel for the state, besides referring to the legislation of many states prescribing in a general way good character as one of the qualifications of a physician, has made a collection of special provisions as to the effect of a conviction of felony. . . .

We are of the opinion that this argument is the more applicable, and must control the answer to this question. No precise limits have been placed upon the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting, not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. . . .

But if a state may require good character as a condition of the practice of medicine, it may rightfully determine what

shall be the evidences of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof. It is not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired result. These are questions for the legislature to determine. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity.

It is not open to doubt that the commission of crime—the violation of the penal laws of a state—has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject-matter, but is only appealing to a well-recognized fact of human experience; and, if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state? The conviction is, as between the state and the defendant, an adjudication of the fact. So, if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine or res judicata, and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care. . . .

The thought which runs through these cases and others of similar import which might be cited is that such legislation is not to be regarded as a mere imposition of additional penalty,

but as prescribing the qualifications for the duties to be discharged and the position to be filled, and naming what is deemed to be, and what is in fact, appropriate evidence of such qualifications. (*Hawker* v. *People of New York,* 170 U. S. 189.)

The general rules applying to the revocation of licenses on statutory grounds apply equally to the refusal or suspension of licenses on the same grounds.

CRIMINAL PENALTIES

In addition to grounds for refusal, suspension, and revocation of licenses such regulatory legislation commonly includes penalties for practicing the healing of diseases without a license and still other penalties for doing some of the things that are named as grounds for refusal, suspension or revocation of licenses. Such penalties consisting of reasonable fines or suitable sentences of imprisonment, or both, are held by the courts to be wholesome and constitutional.

XIV. How the Situation May Be Improved

THE TASK IS FOR THE STATE LEGISLATURES

The regulation of the occupation of healing the sick is accomplished primarily by legislative action, not by judicial decision. It is not supplied by the common law. No court can supply it, except indirectly as judges may interpret legislative acts. The fundamental work must be done by the state legislatures, because the necessary regulation is administrative in character under the general police power. Decisions of the courts relative to questions of medical practice are based on specific provisions of law. If there is no legislative act, there is no judicial decision. If there is a bad act, the judicial decisions thereunder only emphasize the deficiencies of the act. If there is a wise act, the court's decisions at best but reflect the already established wisdom of the legislature. It is, therefore, useless to look to the courts alone for any material help in dealing with cults, double standards of professional educational requirements, or the perpetration of frauds by crooked doctors.

The first thing to do in every state is to procure an act of the legislature that will reflect wisdom and justice. The endeavors of all persons who are interested in progress along these lines should be directed toward inducing legislatures to understand the fundamental principles of the subject-matter involved and to pass the laws that recognize those principles and give public officers, including the courts, power to enforce decency and proficiency in the profession of healing the sick. Such regulation must be done through the state governments; for the United States Government has substantially no original control over this occupation

NOT NECESSARY TO TOLERATE PRESENT BAD METHODS OF REGULATION

For a long time to come we shall doubtless have to continue to get along under a considerable variety of legislative methods of legal regulation throughout the country, some of them good and some of them bad. But it is not necessary for advocates of reasonable standards of educational requirements to tolerate as bad methods of legal regulation as those now prevailing in this country. Existing acts are framed upon the false notion that the many healing cults perform substantially different services, and, therefore, should be subjected to varying standards of educational requirements according to an imaginary idea of the amount of instruction guessed to be necessary in each service to qualify a doctor, not scientifically to recognize a specific disease and scientifically to direct the application of a proper remedial agent thereto, but merely to apply one certain remedial agent, regardless of the healer's ability to recognize and differentiate the various maladies and ascertain and apply the various remedies and kinds of treatment applicable thereto; whereas disciples of all cults, in their practice of the healing art, are forced by practical circumstances to do precisely the same thing, if they do anything at all, viz., to try to diagnose a specific ailment and ultimately to try to apply or direct the application of the particular remedial agent or method most available under the peculiar circumstances of the individual case.

SELFISH INTERESTS ARE AT THE BOTTOM OF LOW STANDARDS

The prevailing multiple standard statutes put the cart before the horse. They have been framed under the

high pressure of selfish, thoroughly organized, extravagantly paid lobbies of one idea and one purpose that persistently throng legislative chambers and propagate error, seeking means for their own profit through improvident legislation, substantially unopposed by any sufficiently organized rival force devoted zealously to supplying to legislators correct information upon the serious subjects involved. The ill prepared doctor who becomes the champion of low standards is commonly engaged in trying to perpetuate his existing means of livelihood without further preparations, and, therefore, spends his money lavishly, devotes all of his time if necessary, and fights hard to win. The skilled doctor who becomes the advocate of reasonable standards is commonly working against his own interest, impelled by an earnest desire to protect the public health and to make his profession honorable, learned and efficient. But the issue does not involve his bread-and-butter pursuit. He, therefore, presents his information, offers his advice, and departs. His adversaries stay on the job.

PREPARE A BILL FOR A UNIFORM LAW

The fact that our states maintain widely differing regulatory types of legislation on this subject, and that in nearly all of them the statutes are subjected to constant contention and frequent change, has given rise to the suggestion that a committee of persons familiar with the topics to be considered and representative of all of the states, be assembled to carry on a thorough investigation of the domain and purposes of such legislation and to prepare a bill for a uniform law to be presented to the legislatures of all of the states.

This suggestion is a wise one and should be put into execution by an association maintaining a sufficiently capable administrative organization to carry it through. There is no fundamental reason why different systems of regulation should obtain among the various states. The subject involves only a few general principles, which apply equally in all of the states, and upon which students of such matters would finally come to substantial agreement. A committee so organized should take five years to make such a study and prepare such a bill. The work of preparation would necessarily involve a much needed campaign of conference, study and education among physicians and laymen throughout the country. The activities of such a committee would undoubtedly result in the formulation of a sane bill, acceptable to the people of the country and wisely framed for the suppression of fraud and the promotion of the public health. The time is ripe for such a venture.

MORE AND BETTER ORGANIZATION

Those who have the public health in view and want to succeed in this contest will have to make a more vigorous fight. They must organize to educate the people and to inform legislators. They must spend their time and money more freely in presenting the public's cause to the legislatures of the country, and, indeed, to the courts, too, which also require ample arguments on the cases before them. The persistent, the vigilant, the crusading men win. It is unfortunate that truth has to be thus enforced and that it is not self-evident. But error propagated by money, enthusiasm and a not too scrupulous regard for facts often—in some fields generally—overcomes truth, which thus crushed to earth only after a long period of time will

rise again. Those who would give the public better laws, if they would succeed, must not be content with merely stating their case scholastically, but they must organize to propagate it and then enforce it and compel attention to it by the practical methods everywhere influential with men, not only today, but tomorrow and year after year, until the truth is permanently embodied in the law as the settled policy of the state.

31.B.59.
Regulation of physicians by law1925
Countway Library
AHE7869
3 2044 045 082 682

COUNTWAY LIBRARY
HC 541F B